IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-470

PARKER SEAL COMPANY, ... Petitioner

- v -

PAUL CUMMINS, ... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Parker Seal Company, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered herein May 23, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (App. D, page 13a) is unreported. The opinion of the District Court (App. B, p. 7a) is unreported. The opinion of the Kentucky Commission on Human Rights (App. A, p. 1a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered May 23, 1975 (App. E, p. 59a). A timely petition for rehearing was denied by order entered July 18, 1975 (App. F, p. 61a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Title VII of the 1964 Civil Rights Act, as amended, and the EEOC's "religious accommodation" guideline promulgated thereunder, require an employer to justify the discharge of an employee who refuses to perform assigned work for religious reasons, by showing that reasonable accommodation to the employee's requirements would impose undue hardship on the conduct of its business. The questions presented in this case are:

1. Whether the Court of Appeals has improperly determined that an employer which tries, unsuccessfully, to accommodate an employee who refuses to work regularly scheduled Saturdays is barred from showing that its continued efforts impose undue hardship.

2. Whether, as construed and applied by the Court of Appeals, the foregoing statute and

guideline, which require an employer to accord preferential treatment to selected employees solely on the basis of their religious beliefs, violate the Establishment Clause of the First Amendment.

3. Whether irreconcilable conflicts between varying panels of the Court below under the statute and guideline here at issue call for the exercise of this Court's supervisory jurisdiction.

CONSTITUTIONAL PROVISION, STATUTE, AND GUIDELINE INVOLVED

The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (Supp. II, 1972).

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

"It shall be an unlawful employment practice for

an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a)(1)(1970).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides in pertinent part:

"[S]ection 703(a)(1) of the Civil Rights Act of 1964 . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

"[T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. § 1605.1 (1974).

STATEMENT OF THE CASE

Introductory Statement. This case presents the Court with the opportunity to consider the EEOC "religious accommodation" guideline, which was last here at the 1970 October Term in *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971), *aff'g by an equally divided Court* 429 F.2d 324 (6th Cir. 1970).

The Court of Appeals has adjudged the petitioner in the instant case, Parker Seal Company, guilty of religious discrimination in employment.[1] The record shows that after a year-long effort at accommodation, Parker discharged Paul Cummins, a plant supervisor who refused to work on Saturdays despite the company's demonstrated need for his services on that day. Following a full evidentiary hearing, the Kentucky Commission on Human Rights ruled that Parker had made a reasonable effort to accomodate its employee's religious beliefs. The United States District Court for the Eastern District of Kentucky reached the same judgment. But the Court of Appeals (per Phillips, C.J.) reversed because, in its view, Parker had failed to demonstrate that retention of Cummins would engender "chaotic personnel problems" or have other "dire effect" upon Parker's business. One judge (Celebrezze, J.) dissented on the ground that, as interpreted by the majority, the applicable federal statute and guideline violated the Establishment Clause of the First Amendment.

The Factual Background. Cummins was hired by Parker in 1958 at its rubber seal factory in Berea, Kentucky. In 1965 he became supervisor of the first shift in the Banbury department of the plant. One requirement of that position was that the

1. Parker Seal Company is the Kentucky trade name of Parker Corporation, formerly the Parker-Hannifin Corporation.

supervisor be present when the first shift was operating the Banbury department, including Saturdays. The Banbury department frequently operated on Saturdays, and for five years Cummins had no objection to working on that day. However, in July 1970, after becoming a member of the World Wide Church of God, which forbids work between sundown on Friday and sundown on Saturday, he suddenly refused to work on Saturdays.

Parker took no action against Cummins.[2] Instead, for fourteen months the company attempted to accommodate his religious views by assigning supervisors from the neighboring department to cover the Banbury department on the first Saturday shift. Generally this involved one supervisor's covering both departments at the same time, although the plant manager regarded this as "absolutely not" good operating procedure. If the neighboring department was not working, the substitute supervisor came to work exclusively to cover the Banbury department.

During the summer of 1971, as the result of substantial overtime, the other supervisors were working 72 hours a week. Cummins, however, was

2. According to Cummins, the plant manager told him "as long as it don't cause any problems I have no objections to you observing the Sabbath" (Tr. 54). ("Tr." refers to the transcript of proceedings before the Kentucky Commission on Human Rights.)

working only 40 hours a week, although he and his colleagues, as supervisors, were all paid a set salary without regard to the number of hours worked.[3] The other supervisors began to complain.

During this period Parker's plant in Berea had shown declining profits, and a large layoff of the work force had taken place. The new plant manager, who was brought in in November 1970, realized that there were serious economic and supervisory problems which had to be solved if the plant was not to be closed.

In particular, the plant manager concluded that Cummins' presence in the Banbury department was required on Saturdays. As he testified,

> "[Cummins'] religion . . . didn't bother me at that time, one way or the other. The fact that he could not work Saturday did. We run a plant that operates six (6) days a week a good percentage of the time. Paul, in a responsible position, running a department, *had to be there if that department was to function the way it should*" (Tr. 173) (emphasis supplied).

In September 1971, the plant manager requested Cummins to reconsider his position on Saturday work. Cummins refused. Thereafter, he was

3. Indeed, as a result of seniority, Cummins received more pay than his colleagues.

discharged.[4] He was fired because he would not work Saturdays.

The Proceedings Below. Upon his discharge, Cummins filed grievances against Parker with both the Kentucky Commission on Human Rights (the "KCHR") and the United States Equal Employment Opportunity Commission (the "EEOC"). After a full evidentiary hearing before a plenary session of the KCHR, that body dismissed Cummins' complaint. The State Commission found that during the period in which Parker permitted Cummins to take Saturdays off, "all [other] supervisory personnel . . . were required to work all hours and days of scheduled regular and scheduled overtime work in their respective departments on their respective shifts"; also, that "Cummins refused to report for scheduled hours and days of regular and overtime work on his shift in his department but lost no wages or benefits as the result of his refusal to work for religious reasons" (App. A, pp. 3a-4a). The Commission, applying Kentucky law which embodied essentially verbatim the federal Civil Rights Act of 1964 and the EEOC Guideline 1605.1, concluded that Parker could not "accommodate [Cummins'] . . . religious needs without placing an undue hardship on the conduct of [its] business" (App. A, p. 6a).

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4. Transfer to a lower grade was barred by Parker's collective bargaining agreement with the union.

Thereupon, following the EEOC's issuance of a "right to sue" letter, Cummins brought the present action against Parker in the United States District Court for the Eastern District of Kentucky. The parties stipulated to the record before the KCHR. On that record, the District Court agreed with the KCHR that Parker had

> "made a reasonable accommodation to the plaintiff's religious needs and that no further accommodation could be made at the time of the [plaintiff's] . . . dismissal from employment without creating an undue hardship on the employer's business.
>
> "The defendant was therefore justified in discharging the plaintiff . . . ." (App. B, pp. 8a-9a).

On appeal, the Court of Appeals for the Sixth Circuit reversed, one judge dissenting. For the two-judge majority, Chief Judge Phillips concluded that under both the applicable EEOC Guideline and the Civil Rights Act of 1964, as amended, Parker had failed to demonstrate "chaotic personnel problems," or any other "dire effect upon the operation of its business" (App. D, p. 29a). The Court suggested that Parker "could have required Appellant to work . . . on Sundays" — even though the plant rarely operated on Sundays, and in any event Cummins was already present on any Sunday

that his department functioned.[5] Alternatively, the Court said, Parker "could have reduced Appellant's salary commensurately with his shorter work week" — thereby cutting his pay almost in half (App. D, p. 29a). Finally, the Court taxed Parker for its one-year effort at accommodation, professing inability to understand "why an accommodation that was reasonable for over a year . . . suddenly became unreasonable in September 1971" (App. D, p. 20a).

Similarly, the Court of Appeals rejected Parker's constitutional argument that as construed and applied, the applicable provisions of the Civil Rights Act and EEOC Guideline violated the Establishment Clause of the First Amendment. The Court conceded that "some religious institutions will derive incidental benefits" from the guideline and statute (App. D, p. 36a). But it discounted the expressed view of the author of the statute that it was designed to counteract the "dwindling of the membership of some . . . religious organizations" (remarks of Sen. Randolph); that argument by one Senator, the Court observed, did "not require the conclusion that Congress enacted the legislation to promote and support *a particular religion*" (App. D, p. 37a) (emphasis supplied). Rather, the Court concluded, the statute and regulation could be

5. *See, e.g.*, Tr. 48, 128, 194.

salvaged because they "are applicable to *all* members of *all* religious faiths who observe Saturday as the Sabbath" (App. D, p. 37a) (emphasis in original). The Court professed to see no violation of the Establishment Clause in this acknowledged federal legislative aid to Sabbitarian religious activity.

Judge Celebrezze dissented. In his view, the statute and guideline had both the purpose and primary effect of promoting and advancing particular religious sects, and therefore violated the Establishment Clause.

REASONS FOR GRANTING THE WRIT

I. THE MISCONSTRUCTION OF THE STATUTE AND GUIDELINE BY THE COURT OF APPEALS WILL DISCOURAGE RELIGIOUS ACCOMMODATION OF EMPLOYEES.

Far from enhancing protection for employees, the Court of Appeals' decision will deter employers from attempting to accommodate the religious needs of their employees for fear that, once having done so, they will be estopped from asserting that their efforts caused them "undue hardship." Having all but written the "reasonable accommodation" rule out of the applicable law, the Court has created

ongoing problems in the administration of an important federal statutory scheme.[6]

Parker accommodated Cummins for more than a year after he announced he would no longer work on Saturdays. Although Cummins' shift in the Banbury department frequently had to operate on Saturdays, he was excused from Saturday work from July 1970 to September 1971, and alternative, makeshift arrangements were made for the necessary supervision. Eventually, however, in view of the severe "economic . . . and supervisory . . . problems" faced by the plant, the plant manager concluded that those arrangements could not continue (Tr. 166). In his words, Cummins "had to be there [on Saturdays] if that department was to function the way it should" (App. D, p. 26a).

The Court of Appeals turned this evidence of attempted accommodation against Parker. The Court rested its decision largely on its professed inability to understand "why an accommodation that was reasonable for over a year . . . suddenly became unreasonable in September 1971" (App. D, p. 20a).

6. Although the 1972 statutory amendment was not in force at the time of Cummins' dismissal, the Court below treated it as simply ratifying the EEOC Guideline, and hence as governing the present case.

In other words, once having embarked on an effort to determine whether Cummins' duties could be adequately discharged without Saturday work, Parker effectively estopped itself from thereafter ever asserting that its efforts ultimately caused it "undue hardship."

The Court of Appeals has supplanted its own views for the plant manager's considered judgment, based on months of experience, that Saturday work was an essential part of the Banbury first shift supervisor's job. Indeed, the Court's conclusion that Cummins' supervisory presence was not required on Saturdays flies in the face of common sense, which tells us that the functions of a supervisor are not those of a mere timekeeper. In a relatively sophisticated manufacturing process, the availability of a full-time supervisor, as a matter of efficient plant management, is indispensable to avoid unnecessary delays or interruptions to the production process.

The Court of Appeals' opinion places the employer in an intolerable position. If he refuses to make any effort to accommodate his Sabbatarian employees, he risks immediate liability under the statute and guideline.[7] But if, like Parker, he makes

7. *Riley* v. *Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972).

an attempt at accommodation which ultimately proves unworkable, the attempt itself will be used against him, as evidence that his claim of "undue hardship" is unfounded. Such a result surely was not intended by the EEOC when it promulgated Guideline 1605.1, nor by Congress when it passed the 1972 amendment to Title VII. Moreover, by discouraging employers from attempting to work out problems arising from employees' religious convictions, the decision below frustrates the purpose of the "religious accommodation" rule.[8]

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8. The unrealistic approach of the Court of Appeals is further demonstrated by its suggestion that, to alleviate the difficulties caused by Cummins' refusal to work on Saturdays, he might have been required to work on Sundays (App. D, p. 29a). Parker's Berea plant rarely operated on Sundays (Tr. 194), and whenever it did, according to Cummins, he was already there (Tr. 48). It is difficult to see what benefit either the company or Cummins would have derived from his supervision of a deserted department on the Sundays that the plant did not operate.

The majority also suggested that Cummins' compensation could have been reduced commensurately with his shorter work week; the Court did not explain how, on its view of Parker's obligation to Cummins, a nearly 50% cut in pay could be reconciled with Title VII's prohibition against discrimination in compensation (App. D, p. 29a).

II. THE STATUTE AND GUIDELINE VIOLATE THE ESTABLISHMENT CLAUSE.

The First Amendment requires the Government "to maintain an attitude of 'neutrality', neither 'advancing' nor 'inhibiting' religion." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 788 (1973). As applied and interpreted by the Court below, the statute and guideline here at issue violate that principle — they require private employers to accord preferential treatment to selected employees, even at the sacrifice of legitimate business interests, *solely* on account of those particular employees' religious beliefs. In the words of Judge Celebrezze, dissenting:

> "The Regulation and Section 2000e(j) grant preferences to employees by reason of their religion, forcing modifications in seniority systems, overtime scheduling, and other forms of employee organization. An employee is exempted from work on Saturdays if he demands release for religious purposes, but other employees are not accorded the same treatment if they prefer not to work on Saturdays. Not only are the latter employees not exempted, but they may have to substitute for the absent religious practitioner on Saturdays or lose their jobs." (App. D, pp. 42a-43a).

The 1972 statutory amendment and the EEOC guideline violate at least the first two branches of the three-part test promulgated by this Court for determining whether legislation comports with the Establishment Clause. *E.g.*, *Meek* v. *Pittinger*, 95 S. Ct. 1753, 1760 (1975); *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, 413 U.S., at 773, 783 n.39; *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971).[9]

First, the statute and guideline lack a primary "secular legislative purpose." The Court of Appeals thought that it could detect such a purpose in a supposed legislative wish "to put teeth in the existing prohibition of religious discrimination" (App. D, p. 33a). But that conclusion lacks foundation. The brief legislative history of the 1972 amendment contains no suggestion that the existing prohibition in Title VII of the 1964 Civil Rights Act was inadequate or, indeed, that religious discrimination in employment was a problem requiring remedial legislation.[10]

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9. It is thus unnecessary to consider whether the statute and guideline violate the third branch as well. *See*, however, Celebrezze, J., dissenting below (App. D, pp. 53a-54a).

10. There was at best sparse evidence of religious (as opposed to racial) discrimination before Congress when it

(Continued on page 17).

Instead, the purpose of the 1972 amendment, as explained by its sponsor, Senator Randolph, was to stem the "dwindling of the membership of some of the religious organizations" which prohibit Saturday labor. 118 Cong. Rec. 705 (1972).[11] Senator Randolph did not suggest that employers were refusing to hire individuals because of their association with such organizations. Rather, he said, there was "a possible inability of employers on some occasions to adjust work schedules to fit the

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(Continued from page 16).

passed the 1964 Civil Rights Act. According to Congressman Celler, Chairman of the House Judiciary Committee:

> "We did not have very much testimony of discrimination on the grounds of religion. You will notice in one of the titles, religion is left out. . . .
>
> "We had very little evidence — I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against." 110 Cong. Rec. 1528-29 (1964).

11. Senator Randolph specifically mentioned the Orthodox Jews, the Seventh-day Adventists, and the denomination to which he himself belonged, the Seventh-day Baptists. In this connection he stated:

> "My own pastor in this area, Rev. Delmer Van Horn, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people. . . ." 118 Cong. Rec. 705 (1972).

requirements of the faith of some of their workers." *Ibid.*

In short, the 1972 amendment and the EEOC regulation from which it was derived were designed precisely to benefit members of particular religious groups whose practices conflicted with employers' normal work schedules. The primary statutory purpose of fostering religion is thus not open to doubt.

Second, the statute and guideline have the "direct and immediate effect" of advancing religion. *See Committee for Public Education & Religious Liberty* v. *Nyquist, supra*, 413 U.S., at 783 n.39. The law requires employers to discriminate *in favor of* individual employees on the basis of their religious beliefs. It thus cannot be said to have a "primary effect" of *inhibiting* religious discrimination in employment, as the Court below thought (App. D, p. 37a).

Indeed, the Court of Appeals conceded that certain religious institutions would benefit from the statute, in that, for example, "churches holding services on Saturdays may enjoy a somewhat larger attendance with a correspondingly fuller collection plate" (App. D, p. 36a). The Court of Appeals concluded, however, that the law did not run afoul of the Establishment Clause, because the statute

was not enacted to promote "a particular religion"; rather, the Court said, the law is applicable to "*all* members of *all* religious faiths who observe Saturday as the Sabbath" (App. D, p. 37a) (emphasis in original). But all laws which "advance religion" are void, no matter whether they "aid one religion, aid all religions, or prefer one religion over another." *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947). *Accord: Committee for Public Education & Religious Liberty* v. *Nyquist, supra*, 413 U.S., at 771-72 (1973); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961).

Because the 1972 amendment requires private employers to discriminate among their employees solely on the basis of their religious beliefs, the law cannot be said to be either "evenhanded in operation" or "neutral in primary impact." *Gillette* v. *United States*, 401 U.S. 437, 450 (1971). Employees who claim exemption from Saturday work on the ground of religious belief must be accommodated, in distinction to those who belong to religious groups which do not oppose Saturday work or who have no religious affiliation at all.

The Court below claimed to find support for its position in this Court's decision in *Gillette* v. *United States, supra*. That reliance was badly misplaced. *Gillette* was a criminal prosecution for refusal to submit to induction. This Court rejected a challenge under the First Amendment to the exemption

available to persons conscientiously opposed to participation in war in any form. The Court of Appeals here thought that, like the conscientious objector exemption in *Gillette*, "the reasonable accommodation rule reflects a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that *they should not be punished* for the supremacy of conscience" (App. D, p. 35a) (emphasis supplied). But Cummins was not subjected to criminal prosecution for refusing to work on Saturdays. He, and others who for religious reasons do not wish to work on particular days, are not "faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution." *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961).

The *Braunfeld* decision, along with other Sunday-closing cases decided by this Court, [12] was also invoked by the Court below. But those decisions are altogether different. They rested on the conclusion that although the state Sunday-closing statutes had religious origins, their present overriding purpose and effect are largely secular — to set aside a uniform day of rest and recreation. As

12. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961); *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617 (1961).

shown above, the "religious accommodation" rule here at issue has no such overriding secular purpose or effect.

Under the Constitution, Congress undoubtedly has the power to require an employer to treat all his employees equally, regardless of their religious beliefs. An employee fired for failure to work on Saturdays when other, similarly placed employees were not required to work on Saturdays, might validly claim discrimination on the basis of his religion. *Cf. McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973). But the religious accommodation rule, as construed by the Court of Appeals, goes far beyond this; it demands that certain employees be placed in a privileged position vis-a-vis their peers, purely on the basis of religious conviction or practice.

The Religion Clauses of the First Amendment were "intended to erect 'a wall of separation between church and State'." *Everson* v. *Board of Education*, *supra*, 330 U.S., at 16. A statutorily mandated deference by private employers to preferred religious groups breaches that wall as effectively as would government discrimination against those particular religions.

III. AN IRRECONCILABLE CONFLICT OF VIEWS AMONG THE JUDGES OF THE SIXTH CIRCUIT REQUIRES THIS COURT'S SUPERVISORY ATTENTION.

On August 20, 1975 — barely three months after decision in this case — the Court below has reached a judgment in a Title VII religious discrimination case hopelessly at odds with the ruling for which Parker seeks review here. In *Reid* v. *Memphis Publishing Co.*, 11 F.E.P. Cases 129 (6th Cir. 1975) (Nos. 74-1761, -1762),[13] the defendant newspaper declined to hire the plaintiff, who had applied for a job as a copyreader, because for religious reasons he refused to work on Saturdays. As with Cummins, the post sought by Reid required "real specialists," whose assignments involved "special skills and adaptability for the work." 11 F.E.P. Cases, at 131-32. As with Cummins, "In order for Reid to be accommodated, another copyreader . . . would have to be involuntarily assigned to take his place on every Saturday, even though the other man did not desire to work on that day." *Id.* at 132. As with Cummins, such an assignment "would create serious morale problems among the other copyreaders," because they "could believe that Reid was being given favorable treatment over them, because of his religion, and that they were being discriminated

13. A copy of the *Reid* opinion is set forth in Appendix G at page 63a.

against and were being penalized because they did not hold the same religious beliefs as Reid." *Id.* The only significant difference between this case and *Reid* is that, unlike Parker Seal Company, the defendant employer in *Reid* "*made no effort whatsoever to accommodate plaintiff Reid's religious beliefs.*" *Id.*, at 137 (Edwards, J., dissenting) (emphasis in original).

The District Court granted judgment to Reid. The Court of Appeals reversed. It concluded that the difficulties feared — but never experienced — by Memphis Publishing amounted to "undue hardship" within the meaning of Title VII. The Court majority reached its decision without once mentioning *Cummins*, although the dissenting judge called his colleagues' attention to the precedent. 11 F.E.P. Cases, at 138 n.1.

Thus Parker, which strived for accomodation for over a year, is held to have violated the law, while Memphis Publishing, which made no effort to do so on an otherwise indistinguishable set of facts, escapes liability. With all respect, the only available ground of difference is the variant composition of the panels which have heard and decided the two cases.

The irreconcilable divergence of views among the panels of the Sixth Circuit mandates this Court's corrective action to achieve consistent administration of the statute.

Application of the principles followed by the *Reid* majority to Parker's case would compel decision for Parker here and reversal of the judgment below. Parker cannot again move for rehearing in the Court of Appeals. Thus, if this Court determines not to grant plenary review, it should vacate the Court of Appeals' judgment and remand for further proceedings, including leave to Parker to suggest the propriety of a rehearing of its cause by the Court of Appeals *en banc* in light of *Reid*. *See United States ex rel. Robinson* v. *Johnston*, 316 U.S. 649 (1942).

CONCLUSION

For the foregoing reasons, Parker Seal Company respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals below upon plenary briefing and argument. Alternatively, Parker respectfully prays that this Court summarily vacate the judgment below and remand for further proceedings in light of the Court of Appeals' decision in *Reid* v. *Memphis Publishing Co.*, *supra*.

Respectfully submitted,

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APPENDIX

APPENDIX A

COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY COMMISSION ON HUMAN RIGHTS
Complaint No. 231-E

PAUL CUMMINS

Finding of Fact
VS: **Conclusions of Law**
Order

PARKER SEAL COMPANY, DIVISION OF PARKER-HANNIFIN CORPORATION

This matter having come on for hearing before the Commission on March 3, 1972, both parties having announced ready for hearing, the Complainant, Paul Cummins, having appeared in person and with Commission attorney, Hon. Thomas Hogan, and the Defendant, Parker Seal Company, being represented by its attorney, Hon. Bennett Clark, and after having heard and considered all of the oral evidence and having considered the briefs and exhibits of the respective parties, the Commission makes the following findings of fact:

Findings of Fact

1. That the complainant, Paul Cummins, was employed by Parker Seal Company from December 9, 1958, until September 3, 1971.

2. That the complainant, Paul Cummins, was employed as a supervisor on the first shift in the Bandbury Department at the Berea plant of the Parker Seal Company from May, 1965, until September 3, 1971.

3. That at all pertinent times herein Paul Cummins was an exempted employee who was considered a part of management, was paid a straight salary not dependent upon the hours of work performed, and was a member of the Cost Goal incentive program.

4. That Parker Seal Company scheduled regular and overtime production work in the Bandbury Department and all other departments as required by sales order bookings.

5. That hourly paid production employees performing overtime work were required by union contract to be paid one and one-half times the regular hourly pay rate for work performed on Saturday and two times the regular hourly rate for work performed on Sunday.

6. That Parker Seal Company has uniformly enforced job qualifications for all supervisors work

scheduled regular and overtime hours and days scheduled for their respective departments and shifts as required by production demands based on sales orders.

7. That Paul Cummins worked scheduled week day work and scheduled Saturday overtime work consistently without protest at the Berea plant of Parker Seal from December 9, 1958, until July, 1970.

8. That after July, 1970, when Paul Cummins joined the World Wide Church of God, he refused to work on any Saturday or any other day of the week regarded by his church as a holy day.

9. That the religious beliefs of Paul Cummins were accommodated by Parker Seal Company between July, 1970, until September 3, 1971, by permitting him to work out his work schedule ahead of time and to not be present at the plant, Saturday or any other day regarded by his church as a holy day.

10. That during the period between July, 1970, and September 3, 1971, overtime work was scheduled approximately two times a month as required by sales order bookings.

11. That during the period between July, 1970, and September 3, 1971, all supervisory personnel, other than Paul Cummins, were required to work all hours and days of scheduled regular and scheduled

overtime work in their respective departments on their respective shifts.

12. That during the period from July, 1970, until September 3, 1971, foremen from the Stock Prep Department of the Parker Seal Berea plant were required to perform the supervisory duties of Paul Cummins on the first shift in the Bandbury Department whenever work was scheduled for the first shift Bandbury Department and Paul Cummins had absented himself from work for religious reasons.

13. That Paul Cummins refused to report for scheduled hours and days of regular and overtime work on his shift in his department but lost no wages or benefits as the result of his refusal to work for religious reasons.

14. That the accommodation of Paul Cummins' religious beliefs for the period between July, 1970, and September 3, 1971, caused complaints to be registered by Stock Prep foreman Chester Webb and Stock Prep foreman Oscar Fain who were required to assume the supervisory duties of the first shift Bandbury Department, whether or not work was scheduled for the Stock Prep Department, whenever Paul Cummins absented himself from work for religious reasons.

15. In early winter, 1970, Parker Seal was suffering a steady profit decline and the new division

general manager instructed the Berea plant manager to attempt an economic turn-around.

16. That the employment of Paul Cummins with Parker Seal Company was terminated because of his refusal to perform the duties of his job as a salaried supervisor in that he did and stated that he would regularly refuse, even if ordered, to perform work scheduled for Saturday and certain days of the year considered by his church as holy days, notwithstanding the uniformly applied company rule requiring that all supervisors perform scheduled work.

Conclusion of Law

The Commission concludes as a Matter of Law:

1. Respondent, Parker Seal Company, Division of Parker-Hannifin Corporation, is an "Employer" as defined by KRS 344.030 (1). Complainant, Paul Cummins, is an "Employee" as defined by KRS 344.030 (4). Accordingly, the Kentucky Commission on Human Rights has jurisdiction of the parties and the instant controversy under the Kentucky Civil Rights Act.

2. KRS 344.020 (1) (a) provides that a purpose of the Kentucky Civil Rights Act is to "provide for the execution within the state of the policies embodied in the Federal Civil Rights Act of 1964 (78 Stat. 241)."

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL CUMMINS — PLAINTIFF

VS — MEMORANDUM OPINION — NO. 2432

PARKER SEAL COMPANY — DEFENDANT

* * * * * *

The claim being asserted in this action by Paul Cummins, a former supervisory employee at the Berea, Kentucky plant of the Parker Seal Company, alleging religious discrimination was initially filed with the United States Equal Employment Opportunity Commission on September 21, 1971, (amended June 30, 1972) and with the Kentucky Commission on Human Rights (hereinafter referred to as KCHR) on September 28, 1971. Thereafter on March 3, 1972, a full evidentuary hearing on the complaint was conducted before the KCHR. At that hearing the plaintiff was represented by Mr. Thomas L. Hogan, the KCHR attorney, who is also the plaintiff's attorney in the present action. Subsequent to the evidentuary hearing, on April 12, 1972, the

KCHR rendered its Findings of Fact, Conclusions of Law, and Order dismissing Paul Cummins' complaint of religious discrimination and ruled that although the employer had an obligation to accommodate his religion the company's attempt to do so had placed an undue hardship on the conduct of Parker Seal's business.

The plaintiff failed to appeal the order of dismissal of the Kentucky Commission on Human Rights, and that order became a final order on May 12, 1972. On September 26, 1972, the plaintiff filed the present action which is identical in all respects – parties, facts, law sought to be applied and remedy sought – with the case previously tried before the Kentucky Commission on Human Rights.

It appears that the plaintiff was afforded a full and fair hearing before the Kentucky Commission on Human Rights and that Commission properly found that the defendant's attempts to accommodate itself to the plaintiff's religious needs was causing the defendant undue hardship.

This Court finds from the entire record herein that the defendant made a reasonable accommodation to the plaintiff's religious needs and that no further accommodation could be made at the time of the defendant's dismissal from employment without creating an undue hardship on the employer's business.

The defendant was therefore justified in discharging the plaintiff and a Judgment will therefore this date be entered for the defendant and dismissing the complaint herein.

The Court hereby adopts this Opinion as its Findings of Fact and Conclusions of Law herein.

This the 19th day of March, 1974.

/s/ Bernard T. Moynahan, Jr.
Chief Judge

A True Copy Attest

Davis T. McGarvey, Clerk
U.S. District Court
By /s/ Hilda F. Watkins
D. C.

APPENDIX C

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL CUMMINS		PLAINTIFF
VS	JUDGMENT	NO. 2432
PARKER SEAL COMPANY		DEFENDANT

* * * * * *

In conformity with the Memorandum Opinion this date filed herein;

IT IS NOW THEREFORE ORDERED AND ADJUDGED herein as follows:

(1) That the plaintiff's complaint herein be dismissed.

(2) That Judgment be entered in favor of the defendant herein.

(3) That the defendant's Motion for the Allowance of an attorney's fee herein be overruled.

(4) That the defendant recover of the plaintiff its properly taxable costs herein.

This the 19th day of March, 1974.

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON March 20, 1974

DAVIS T. MCGARVEY, CLERK

BY: Hilda F. Watkins D.C.

/s/ Bernard T. Moynahan, Jr.
Chief Judge

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court
By Hilda F. Watkins
D. C.

APPENDIX D

APPENDIX D

No. 74-1607

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PAUL CUMMINS, *Plaintiff-Appellant,*

v.

PARKER SEAL COMPANY, *Defendant-Appellee.*

APPEAL from the United States District Court
for the Eastern District of Kentucky,
Lexington Division.

Decided and Filed May 23, 1975.

Before PHILLIPS, Chief Judge, and CELEBREZZE and McCREE, Circuit Judges.

PHILLIPS, Chief Judge, delivered the opinion of the Court, in which McCREE, Circuit Judge joined.

CELEBREZZE, Circuit Judge, (pp. 21-31) filed a separate dissenting opinion.

PHILLIPS, Chief Judge. Appellant Paul Cummins brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., alleging that he had been illegally discharged on the basis of his religion. In essence the complaint charged that Appellant's employer, Parker Seal Company, did not perform its duty under the Act to accommodate Appellant's religious practices and observances. The District Court entered judgment in favor of the Company, and this appeal followed. For the reasons stated below, we reverse and remand for further proceedings.

On December 9, 1958, Appellant was hired as a production scheduler in the Banbury Department of Appellee's Berea, Kentucky plant. In May 1965, Appellant was made supervisor of the first (7:00 a.m. to 3:00 p.m.) Banbury shift. As a supervisor, he was salaried and was obligated to work whatever hours were scheduled, including Saturdays.

In July 1970, Appellant joined the World Wide Church of God, which forbids work on the Sabbath (Friday sundown to Saturday sundown) and on certain holy days. From that time Appellant refused to work on Saturdays. After complaints arose from fellow supervisors who were forced to substitute for him on Saturdays, Appellant was discharged.

Appellant filed a charge of religious discrimination against Appellee with the United States Equal Employment Opportunity Commission (EEOC) and a similar complaint with the Kentucky Commission on Human Rights (KCHR). On April 12, 1972 after a hearing, the KCHR dismissed the charge.[1] On September 5, 1972, the EEOC issued a right to sue letter, and Appellant filed this action on September 26, 1972.

The parties stipulated that the transcript of the KCHR hearing should serve as the complete factual record in the District Court. On the basis of that transcript the District Court found as follows:

> The plaintiff failed to appeal the order of dismissal of the Kentucky Commission on Human Rights, and that order became a final order on May 12, 1972. On September 26, 1972, the plaintiff filed the present action which is identical in all respects — parties, facts, law sought to be applied and remedy sought — with the case previously tried before the Kentucky Commission on Human Rights.
>
> It appears that the plaintiff was afforded a full and fair hearing before the Kentucky Commission on Human Rights and that Commission properly found that the defendant's attempts to accommodate itself to the plaintiff's religious

1. Order of Ky. Comm'n on Human Rights, No. 231-E (April 12, 1972).

needs was causing the defendant undue hardship.

This Court finds from the entire record herein that the defendant made a reasonable accommodation to the plaintiff's religious needs and that no further accommodation could be made at the time of the defendant's dismissal from employment without creating an undue hardship on the employer's business.

The defendant was therefore justified in discharging the plaintiff and a Judgment will therefore this date be entered for the defendant and dismissing the complaint herein.[2]

On appeal, Appellant argues that the District Court's findings are erroneous and that his employer's conduct did amount to religious discrimination under Title VII. Appellee asserts three alternative bases for affirmance: (1) that the KCHR order has res judicata effect; (2) that the District Court correctly concluded that Appellee reasonably accommodated Appellant's religious practices as fully as Title VII requires; and (3) that the rule requiring employers to accommodate their employees' religious practices violates the establishment clause of the first amendment. We discuss each of these issues in turn.

2. District Court Memorandum Opinion, No. 2432 (E.D. Ky., filed March 20, 1974).

I. Res Judicata

Appellee asserted in its brief that Appellant's complaint should have been dismissed because the KCHR's order against Appellant has res judicata effect, barring relitigation of the same claim rejected by the state tribunal. It cited *Batiste* v. *Furnco Construction Corp.*, 350 F. Supp. 10 (N.D. Ill. 1972), in support of this contention.

At oral argument Appellee abandoned this defense in view of *Batiste's* reversal by the Seventh Circuit. *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974).

Insofar as the District Court's decision may rest on the doctrine of res judicata, it cannot stand. A party is not foreclosed from pursuing his federal remedy under Title VII because he has first been a party to a state proceeding. *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972).

II. Reasonable Accommodation

The basis of Appellant's complaint was 42 U.S.C. § 2000e, as it existed before its 1972 amendment. Section 2000e-2, which has not itself been amended, states in relevant part,

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) . . . to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin . . . .

An EEOC Regulation, 29 C.F.R. § 1605.1 (1974), which was in force at the time of Appellant's discharge, provides as follows:

> **§1605.1 Observation of the Sabbath and other religious holidays.**
>
> (a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.
>
> (b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving

> that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.
>
> (d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

The consistency of this Regulation with pre-1972 Title VII was upheld in *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972). As we noted there, a 1972 amendment to Title VII, which incorporates the substance of this Regulation, shows that the Regulation "did express the prior intention of Congress."[3] 468 F.2d at 351. Because Appellant's discharge occurred before the enactment of the 1972 amendment, his claim is governed by Regulation 1605. However, for purposes of this case there is no difference between the Regulation and the amendment. The question under either provision is whether Appellee met its burden of proving that no reasonable accommodation to Appellant's Sabbath observance was possible without imposing an undue hardship on the conduct of Appellee's business.

---

3. The 1972 amendment added the following paragraph to § 2000e:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The District Court found that Appellee "made a reasonable accommodation to [Appellant's] religious needs and that no further accommodation could be made at the time of [Appellant's] dismissal from employment without creating an undue hardship on the employer's business." The court did not specify what "undue hardship" would have resulted and did not explain why an accommodation that was reasonable for over a year (from July 1970, when Appellant joined the World Wide Church of God, until his discharge) suddenly became unreasonable in September 1971.

Our standard of review is limited when reviewing factual findings, FED. R. CIV. P. 52(a), but is unlimited when determining whether the District Court committed errors of law. Because the District Court worded its findings in conclusory fashion, it is necessary to review the evidence presented to the KCHR, which constitutes the record in this case.

The first witness to testify before the KCHR was Rev. Kelly H. Barfield of the World Wide Church of God. His testimony was that as a member of his congregation Appellant was not permitted to work from Friday sunset to Saturday sunset and on seven holy days corresponding to Jewish observances.

Appellant was the second witness. He testified that the Berea plant's operations consisted of a

Stock Preparation Department and the Banbury Department. To go from one to the other required passing through a sliding door that separated the Departments. When both Departments were working at capacity, each normally had one supervisor. When necessary, a single supervisor could handle both Departments, and this was common practice when shifts were operating at less than full capacity. While Appellant was the only supervisor specifically assigned to the Banbury Department, normally he worked only during the *first* shift (from 7:00 a.m. to 3:00 p.m., Monday through Friday), and no supervisor was assigned to the lighter second and third shifts. A supervisor from the Stock Preparation Department covered these shifts. This was feasible because the supervisor's major responsibility was to schedule production after securing orders from clients. Appellant testified that he thus spent "a very small amount of time observing" his men.

Appellant testified that upon joining the World Wide Church of God, he informed Plant Manager Saylor that he could not work Saturdays, and Saylor gave permission for this. Appellant testified that Stock Preparation supervisors substituted for him on Saturdays and that he was available to substitute for them "at any other time other than my Sabbath or an annual holy day."

When L. G. Haddock replaced Saylor as the Plant Manager in November 1970, he told Appellant that his no-Saturdays schedule would be acceptable "as long as it don't cause any problems," in Appellant's words. In August 1971 Haddock told Appellant that he had received a complaint from another supervisor about his not working on Saturdays and that he would have to start working on Saturdays. On September 3, 1971, Haddock announced that he needed a Banbury supervisor who could work six days a week, that he could not transfer Appellant "because there were supposed to be no down-grades," and that he was forced to terminate Appellant that day.

Appellant testified that he tried to schedule his vacation to coincide with some of his Church's holy days and that the efficiency and safety of the Banbury Department did not suffer with the Stock Preparation supervisor covering the Banbury Department, so long as Appellant had done proper scheduling. Appellant stated that the company allowed two employees under his supervision not to work on Sundays for religious reasons.

The third witness was Mr. Conley Saylor, the Berea Plant Manager until November 1970. He testified that in the summer of 1970 the supervisory staff was working from ten to fourteen hours a day because of extra demand imposed by a strike at Appellee's Lexington plant. Despite this, Saylor did

not call in a separate supervisor for the Banbury Department on Saturdays because "its always been kind of a set up down through the years that if the Banbury Supervisor was not there the Stock Prep. Supervisor covered both sides of it." He stated that Appellant "did a very adequate job" as Banbury Department supervisor. Saylor testified that Stock Preparation Supervisor Webb had told him that he was "tired of having to work so many hours when [Appellant] was not even working Saturdays." Saylor said that it was not good operating procedure to have one supervisor for both departments, but that this procedure had been used for years especially when shifts were light, so that problems with production were "nothing related to [Appellant's] situation."

The fourth witness was Mr. Oscar Fain, a Stock Preparation supervisor and Appellant's brother-in-law. Fain testified that Appellant had substituted for him three times and that he had volunteered to cover for Fain anytime other than a Sabbath or holy day. He said there had been dissension among the supervisors because of Appellant's no-Saturdays rule and that he had told Plant Manager Haddock "that I respected [Appellant's] religion but that if he was scheduled to work, he should work on Saturday."

Mr. Chester Webb, also a Stock Preparation supervisor, was the fifth witness. He testified that when covering both the Banbury shift and the Stock

Preparation Department, he "just went over there to make sure they were working and there wasn't nothing down, any machinery broken down or anything like that." He did not complain to Haddock about Appellant's not working on Saturdays, though he did complain to a supervisor, Mr. Hunt, that he had to work on every Saturday work was scheduled. Webb testified that Appellant volunteered to and did fill in for him when asked.

The sixth witness, Mr. Bobby Abrams, replaced Appellant at the Banbury Department after his discharge. He testified that Mr. Hunt had told him Appellant's failure to work scheduled hours was the reason for his discharge. Abrams now works whenever work is scheduled, including approximately every other Saturday. He testified that he spends seven hours of an eight-hour day supervising his men and one hour scheduling.

Mr. L. G. Haddock, Plant Manager from November 1970 through Appellant's dismissal, was the seventh witness. Several excerpts from his testimony are particularly relevant, as it was Haddock who fired Appellant.

Q-25. Why was Paul Cummins fired from Parker Seal Company?

A. Basically because he could not work Saturdays but it goes further than that,

it was a fact that he was not co-operating with the fellows down in the Stock Prep. Department.

Q-26. But basically it was because he wouldn't Saturday?

A. That was the base of the problem, yes. The problem was that he could not work with the other Supervisors, or would not.

Q-27. What do you mean, work with the other Supervisors?

A. In the Stock Prep. Department which is adjacent to the Banbury, we had three (3) Supervisors, one (1) on each shift. During July and August of 71 we had a vacation schedule in which, during four (4) straight weeks, at least one (1) of those fellows was on vacation and during that time the other two (2) guys were covering twelve (12) hours a day and we were working six (6) days a week then. They were covering twelve (12) hours a day, six (6) days a week, or seventy-two (72) hours each. And Paul at that time was working eight (8) hours a day, five (5) days a week. And I had complaints.

* * *

Q-32. Did you ever ask Paul to work on Saturdays?

A. No. sir.

Q-33. But you fired him for not working Saturdays?

A. I asked him, I think it was two (2) weeks before he left, I asked him if there was any — I knew he had adopted this religion a year and a half or two (2) years ago or so, and I did ask him if there was any possibility of his being able to change his ideas or anything like that and he told me then that he was firmly fixed with his religion.

Q-34. Is that when you decided to fire him?

A. It was after that.

* * *

His religion doesn't bother me, didn't bother me at that time, one way or the other. The fact that he could not work Saturday did. We run a plant that operates six (6) days a week a good percentage of the time. Paul, in a responsible position, running a department, had to be there if that department was to function the way it should.

* * *

Q-53. There's a problem, I can understand, but I don't understand what deep problem

Paul had that he had to volunteer to another Supervisor to work?

A. Well, when I get complaints from two (2) out of three (3) Supervisors of a department because they are working seventy (70) hours a week and Paul is only working forty (40) hours a week, then I had a problem between Supervisors. In a group of seventeen (17) Supervisors, who I was trying to weld into a group, a team, you can't do that if one (1) of them is going to be a loner.

A fair analysis of Haddock's testimony is that Appellant's no-Saturdays rule caused resentment among fellow supervisors. Haddock did not force Appellant to work longer weekday hours by ordering him to substitute for other supervisors at the end of his shift, as Haddock expected Appellant to volunteer to do this. Although Appellant did volunteer to work for his colleagues at any time other than his Sabbath and holy days, he was rarely asked to substitute. Instead, Haddock decided that Appellant had become a "loner," gave him a choice between giving up his religion or his job, and fired him when Appellant did not change his religious convictions.

The final witness was Mr. Ray Kuhn, General Manager of the Division that included Appellant's Department. He testified that there had been

production problems in 1970 and 1971, which required extra efforts by all management personnel. As a member of Appellee's Cost Goal Program, Appellant had been expected to exercise individual initiative. Kuhn testified that Appellant "was discharged because his refusal to work on Saturday was causing considerable consternation and problems with the rest of our employees who were being required to work a full shift." He testified that Sunday work was not scheduled to accommodate Appellant, adding that "I have never had to ask my employees to work Sunday."

A fair reading of the KCHR transcript indicates that the major reason for Appellant's discharge was, in the words of General Manager Kuhn, the "considerable consternation and problems with the rest of our employees who were being required to work a full shift." In short, Appellant's fellow supervisors resented having to work on Saturdays while Appellant was not forced to do so.

On this record, we see no substantial evidence to support the District Court's conclusion that accommodation of Appellant's religious practices would have imposed an undue hardship on the conduct of Appellee's business. The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business. If employees are disgruntled because an employer accommodates its

work rules to the religious needs of one employee, under EEOC Regulation 1605 and §2000e(j) such grumbling must yield to the single employee's right to practice his religion. Moreover the fact that Saturday Sabbath observance by one employee forces other employees to substitute during weekend hours does not demonstrate an undue hardship on the employer's business. It is conceivable that employee morale problems could become so acute that they would constitute an undue hardship. The EEOC, in interpreting Regulation 1605, has noted the possibility of undue hardship when the employer can make a persuasive showing that employee discontent will produce "chaotic personnel problems." EEOC Decision No. 72-0606 (Dec. 22, 1971), CCH EEOC DEC. ¶6310, at 4555 (1972); EEOC Decision No. 71-463 (Nov. 13, 1970), CCH EEOC DEC. ¶6206, at 4350 (1972).

In the case at bar, however, Appellee has shown no such dire effect upon the operation of its business. To the contrary, the complaints of Appellant's fellow supervisors seem both mild and infrequent. In addition, it appears that Appellee might have alleviated at least some of the dissension if it had pursued a more active course of accommodation. For example, Appellee's officials could have required Appellant to work longer hours on week days or on Sundays. They could have reduced Appellant's salary commensurately with his shorter work week. They could have taken pains to

ensure that Appellant substituted for his colleagues on an equitable basis, rather than assuming that the co-workers would make appropriate demands upon Appellant.

Appellee was inconvenienced by Appellant's no-Saturdays rule, but to call the inconvenience shown on this record "undue hardship" would be to venture into "an Alice-in-Wonderland world where words have no meaning." *Welsh* v. *United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring). Undue hardship is something greater than hardship, and Appellee did not demonstrate in the record below how accommodation to Appellant's religious practices would have imposed an unreasonable strain on its business, having lived with the situation for over one year before Appellant's discharge.

To the extent, therefore, that the District Court's decision rested on a finding that no accommodation of Appellant's religious practices was possible without an undue hardship upon Appellee's business, we are "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Accordingly, the District Court's finding is clearly erroneous and cannot stand. *Parmer* v. *National Cash Register Co.*, 503 F.2d 275, 277 (6th Cir. 1974).

We conclude that Appellee did not reasonably accommodate Appellant's religious practices and that

Appellee has not shown that such an accommodation would have imposed an undue hardship on the conduct of its business. Thus by discharging Appellant, Appellee has discriminated against him on the basis of his religion in violation of Title VII of the Civil Rights Act of 1964.

III. First Amendment

Appellee seeks to sustain the District Court's decision upon the ground that 29 C.F.R. §1605.1 (1974) and 42 U.S.C. §2000e(j) are laws "respecting an establishment of religion" and therefore invalid under the first amendment. Appellee argues that the reasonable accommodation rule fosters religion by requiring private employers to defer to their employees' religious idiosyncrasies. Appellee points out that under the rule an employer may be required to excuse an employee from Saturday work to attend church, but an atheistic employee who wishes to go fishing on Saturdays enjoys no similar right under the Civil Rights Act. Thus Appellee believes the rule constitutes a governmentally mandated preference for religion that is impermissible under the first amendment.

In *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971), this court warned that to construe the Civil Rights Act "as authorizing the adoption of Regulations which would coerce or

compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment." 429 F.2d at 334. Two years later, in *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972), we made the following statement:

> [W]e do not overlook the fact that the Dewey majority in our court expressed doubts about the constitutional validity of the E.E.O.C. regulation (29 C.F.R. 1605.1 (1970)) which is applicable to the refusal to hire appellant Reid.
>
> . . . .
>
> Whatever doubts there may have been about the constitutionality of this regulation or its consistency with the statute have been, we believe, laid to rest by a unanimous Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971). While *Duke Power* dealt with racial discrimination and our current concern is with religious discrimination, the Equal Employment Statute treats them similarly.
>
> 468 F.2d at 349-50

However, in *Reid* we did not discuss specifically the establishment clause problem.

In *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), the Supreme Court outlined the three standards that any law must meet to survive an establishment clause challenge. In order to pass

constitutional muster, a law (1) "must reflect a clearly secular legislative purpose," (2) "must have a primary effect that neither advances nor inhibits religion," and (3) "must avoid excessive government entanglement with religion." 413 U.S. at 772-73. We conclude that 42 U.S.C. §2000e(j) and 29 C.F.R. §1605.1 satisfy these tests and thus are not inconsistent with the first amendment.

First, we believe that Regulation 1605 and §2000e(j) are sustained by an adequate secular purpose. The reasonable accommodation rule, like Title VII as a whole, was intended to prevent discrimination in employment. Specifically, the rule was designed to put teeth in the existing prohibition of religious discrimination. Senator Randolph, who proposed the amendment that became §2000e(j), stated his purpose as follows:

> Mr. RANDOLPH: Mr. President, freedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States. Yet our courts have on occasion determined that this freedom is nebulous, at least in some ways. So in presenting this proposal to S. 2515, it is my desire and I hope the desire of my colleagues, to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.
>
> 118 CONG. REC. 705 (1972).

Surely this is a far cry from cases such as *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), in which the Supreme Court struck down an Arkansas statute prohibiting public schools and universities from teaching the Darwinian theory of evolution. The Court concluded that the law sprang from "fundamentalist sectarian conviction" and was intended "to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." 393 U.S. at 107-09.

In addition, we think that *Gillette* v. *United States*, 401 U.S. 437 (1971), although obviously distinguishable from the case at bar, does set forth a rationale that is applicable here. In *Gillette* the Supreme Court rejected an establishment clause challenge to the draft exemption available to any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C. App. §456(j). The petitioners argued that §456(j) was designed to foster or favor religious sects that oppose war in any form, at the expense of sects forbidding participation in particular, "unjust" wars.

The Court concluded that §456(j) "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions. There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an

effective fighting man . . . but no doubt the section reflects as well the view that in the forum of conscience, duty to a moral power higher than the State has always been maintained.' *United States* v. *Macintosh*, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting)." 401 U.S. at 452-53. The Court further stated:

> The point is that these affirmative purposes are neutral in the sense of the Establishment Clause. Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." *United States* v. *Macintosh*, *supra*, at 634 (Hughes, C.J., dissenting).
>
> 401 U.S. at 453.

Similarly, we think that pragmatic, neutral purposes underlie Regulation 1605 and §2000e(j). Like the conscientious objector exemption, the reasonable accommodation rule reflects a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience. Without considering the impact of the free exercise clause, the Court in *Gillette* found a valid secular purpose in the congressional desire to promote and to protect the sort of conscientious action thought to be important in a democratic

society. We believe that similar considerations were implicit in the reasonable accommodation rule, which to that extent is sustained by a neutral legislative purpose.

Secondly, it is apparent to us that Regulation 1605 and §2000e(j) have a primary effect that neither advances nor inhibits religion. In practice, the reasonable accommodation rule restrains employers from enforcing uniform work rules that, although facially neutral, discriminate in effect against employees holding certain religious convictions. Thus the rule guarantees job security except when accommodation of an employee's religious practices would impose an undue hardship upon the employer's business. Regulation 1605 and §2000e(j) mandate no financial support, direct or indirect, for religious institutions, a factor we find significant in view of the traditional characterization of such governmental aid as one of the primary evils against which the establishment clause protects. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970).

It cannot be denied that some religious institutions will derive incidental benefits from Regulation 1605 and § 2000e(j). For example, churches holding services on Saturdays may enjoy a somewhat larger attendance with a correspondingly fuller collection plate. Senator Randolph mentioned this possibility when speaking in favor of his amendment:

> I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times of the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.
>
> 118 CONG. REC. 705 (1972).

Senator Randolph also made reference to the concern of a particular pastor with respect to the problems caused by the failure of employers to adjust work schedules to fit the requirements of the faith of some of the workers. The statute and regulation are applicable to *all* members of *all* religious faiths who observe Saturday as the Sabbath. We conclude that the argument of one Senator that the proposed legislation would assist a particular pastor and religious group does not require the conclusion that Congress enacted the legislation to promote and support a particular religion.

The Supreme Court has made it clear that a law is not necessarily unconstitutional merely because it confers incidental or indirect benefits upon religious institutions. *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 771-72 (1973). In our view, the primary effect of Regulation 1605 and § 2000e(j) is to inhibit discrimination, not to advance religion.

Nor do we believe that Regulation 1605 and § 2000e(j) raise the spectre of excessive government entanglement with religion. Surely the reasonable accommodation requirement will not subject religious institutions to the sort of "comprehensive, discriminating, and continuing [governmental] surveillance" that the Supreme Court found impermissible in *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). By contrast, Regulation 1605 and § 2000e(j) require little or no contact between religious institutions and governmental entities. For the most part, the EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. These issues will be considered in the labor relations context, and their resolution certainly does not necessitate any government entanglement with religion.

Appellee suggests, however, the EEOC investigators will be forced to study and to evaluate the dogma of the many religious sects in order to ascertain whether employees' practices and observances are genuinely religious and therefore protected under Title VII. In most cases, this issue probably will not be disputed seriously. To the extent that the question does arise, however, we think that it will require no more government involvement in religion than the concedely noxexcessive entanglement that occurs when a state

must determine whether a purported church qualifies for a property tax exemption. *See Walz* v. *Tax Comm'n*, 397 U.S. 664, 674-76 (1970); *id.* at 698-99 (opinion of Harlan, J.).

Although the foregoing discussion disposes of Appellee's first amendment contention, we think our decision here gains additional support from a group of Supreme Court cases upholding various state Sunday closing laws. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Two Guys* v. *McGinley*, 366 U.S. 582 (1961); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617 (1961). In these cases the Court rejected establishment clause challenges, concluding that over the years the laws in question had evolved from their religious origins and had come to take on a secular character. The Court held that the statutes' present purpose and effect was not to aid religion but to set aside a uniform day of rest and recreation.

Sunday closing laws have the effect of forcing employers, even unwilling ones, to shut down operations on Sundays, thereby accommodating, at least coincidentally, the religious needs of the dominant Christian population. By contrast, § 2000e(j) requires only a reasonable accommodation of employees' religious practices, and only if that can be accomplished without undue hardship on the employer's business. Surely this constitutes a lesser

interference with the rights of the employer than does a law requiring the employer to close his business entirely. Moreover, we are unable to perceive any greater tendency toward the establishment of religion in § 2000e(j) than in the Sunday closing laws. Thus we believe the result reached here is supported, if not compelled, by *McGowan* and its companion cases.

In summary, we hold that the reasonable accommodation rule is not inconsistent with the establishment clause of the first amendment. Accordingly, we find no constitutional basis for sustaining the District Court's decision. Since we have concluded that Appellant was the victim of religious discrimination within the meaning of Title VII, we must remand the case for a determination of the appropriate relief. At this point we simply note that the District Court should consider reinstatement, back pay and attorney's fees. *See* 42 U.S.C. §§ 2000e-5(g), 2000e-5(k).

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

Costs are taxed against Parker Seal Company.

CELEBREZZE, Circuit Judge dissenting. I respectfully dissent. The Bill of Rights, which contains the First Amendment, has endured because the federal judiciary has refused to cut constitutional corners to achieve temporary solutions to immediate problems. The majority departs from this tradition today, without thought to the damage that may be done to future generations.

What the majority fails to grasp is that if Congress is permitted to breach the First Amendment by granting benefits to religion, it is thereby empowered to breach it to take away religious freedoms. In adopting the Bill of Rights the Framers were exceedingly careful to require of Government a neutral position in religious affairs, declaring religious freedom and denying special privileges to one religious group to the detriment of others. The majority, by judicial fiat, revises the Constitution, bypassing the ratification process. To follow the course advocated by the majority would mean approving a breach of the wall of separation between Church and State erected by the First Amendment. In time, as the breach grows, it could lead to political tyranny, with religious groups advancing their particular interests through our political institutions. I cannot concur in this departure from the neutral position to which Government is assigned under our form of political life.

Neutrality is the heart of the religion clauses of the First Amendment. The Supreme Court has steadfastly upheld Jefferson's injunction that Government remain neutral in religious affairs, with the First Amendment standing as "a wall of separation between church and State." *McCollum* v. *Board of Education*, 333 U.S. 203, 211 (1948); *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1947); *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878).[1] The wall must protect against friendly assistance as well as hostile assaults, so that religion and government remain free from the sustenance and interference of one another. *See Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 788-89 (1973); *Everson* v. *Board of Education*, 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting). This principle "forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses." *Gillette* v. *United States*, 401 U.S. 437, 452 (1971).

By Regulation 1605.1 and by 42 U.S.C. § 2000e(j), the Federal Government has breached the wall. The Regulation and Section 2000e(j) grant preferences to employees by reason of their religion, forcing modifications in seniority systems, overtime scheduling, and other forms of employee organization. An employee is exempted from work

1. Padover, The Complete Jefferson 518-19 (1943). *See* Kurland, "Of Church and State and the Supreme Court." 29 U. Chi. L. Rev. 1, 96 (1962).

on Saturdays if he demands release for religious purposes, but other employees are not accorded the same treatment if they perfer not to work on Saturdays. Not only are the latter employees not exempted, but they may have to substitute for the absent religious practitioner on Saturdays or lose their jobs.

Exemption from uniform work rules for religious reasons has been recognized as an unfair and undue preference under collective bargaining agreements. *See, e.g., John Morrell & Co.*, 17 Lab Arb. 280, 282 (1951); *Singer Co.*, 48 Lab. Arb. 1343 (1967). Judicial decisions not directly involving Regulation 1605.1 or Section 2000e(j) have underscored the inequity of a special rule for certain employees on religious grounds. *See, e.g., Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971); *Eastern Greyhound Lines Division* v. *New York State Division of Human Rights*, 27 N.Y. 2d 279, 265 N.E. 2d 745, *aff'g* 34 App. Div. 2d 916, 311 N.Y.S. 2d 465 (1970); *Andrews* v. *O'Grady*, 44 Misc. 2d 28, 252 N.Y.S. 2d 814 (1964); *Otten* v. *Baltimore & O. R.R.*, 205 F.2d 58 (2d Cir. 1953). *See also Hammond* v. *United Paperworkers Union*, 462 F.2d 174 (6th Cir.), *cert. denied*, 409 U.S. 1028 (1972); *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by equally divided court*, 402 U.S. 689 (1971).

Granting special privileges because of the exercise of one's religion is just as wrong as denying employment opportunity because of one's religious beliefs. When Government engages in either practice, it discriminates on the basis of religion and abandons its neutrality.

As the majority points out, any rule must surmount three hurdles before it can be approved under the Establishment Clause. As the Supreme Court stated in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 773 (1973):

> [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purposes [citation omitted], second, must have a primary effect that neither advances nor inhibits religion, [citations omitted], and third, must avoid excessive government entanglement with religion.[2]

I believe that the rule meets neither of the first two requirements under *Nyquist*.

The majority finds two "secular" purposes in the rule. First, it asserts that the rule is meant "to put teeth in the existing prohibition of religious discrimination." Second, it reasons that "the

2. *See also Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971); *Gillette* v. *United States*, 401 U.S. 437, 450 (1971).

reasonable accomodation rule reflects a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience." Neither of these rationales justifies the rule.

There is no doubt that Congress acted with a valid secular purpose in banning employment discrimination based on religion through Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq*. The expressed purpose of that legislation was to end discrimination based on certain factors that had no relation to an individual's ability and initiative and, accordingly, to end the burden on interstate commerce imposed by various forms of invidious discrimination.[3] The object was to make religion a meaningless factor in employment decisions.

This secular purpose does not justify the 1972 religious accommodation amendment, which incorporated EEOC Regulation 1605.1 into Title VII. Section 2000e(j) defines religion so as to require that persons receive preferential treatment because of their religion. This contradicts the secular purpose behind the original Title VII. Rather than "putting teeth" into the Act, it mandates religious discrimination, thus departing from the Act's basic

3. 110 Cong. Rec. 1521-28 (1964).

purpose. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971).

The second purportedly secular justification for the rule is that it recognizes that "certain persons will not compromise their religious convictions" and ensures "that they will not be punished for the supremacy of conscience."

The absence of a religious accommodation rule, however, would not amount to punishment. It would simply be a "hands-off" attitude on government's part, allowing employers and employees to settle their own differences. The rule grants benefits to religious practitioners because of their religion. The second rationale the majority advances, therefore, amounts to an assertion that it is a valid secular purpose to grant preferences to persons whose religious practices do not fit prevailing patterns. Indeed, the legislative history of the 1972 amendment reveals Congressional thinking that the Establishment Clause was not violated because "[i]n dealing with the free exercise [of religion], really, this promotes the constitutional demand in that respect."[4]

It is, of course, fundamental that the First Amendment protects the free exercise of all religions, whatever the number of their practitioners.

4. Remarks of Sen. Williams, 118 Cong. Rec. 706 (1972).

"A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin* v. *Yoder*, 406 U.S. 205, 224 (1972). Thus, Government may not penalize persons on the basis of their religion.

The Free Exercise Clause requires, for example, that when Government distributes unemployment benefits, it not withhold them from persons who refuse to work on Saturday because of their religious beliefs but are willing to take jobs which do not require Saturday work, *Sherbert* v. *Verner*, 374 U.S. 398 (1963). The holding in *Sherbert* "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." 374 U.S. at 409. *Sherbert* means that Government may not grant benefits to a uniform class of persons but exclude certain people "because of their faith, or lack of it." *Sherbert*, 374 U.S. at 410, *citing Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947). *See also Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). *But cf. Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Cleveland* v. *United States*, 329 U.S. 14 (1946); *Reynolds* v. *United States*, 98 U.S. 145 (1878).

The fact that Government may not penalize particular religions[5] does not mean that Congress may favor particular religions. On the contrary, it means that Congress may not. The argument that aid to religious institutions is justified under a broad reading of the Free Exercise Clause had been raised on behalf of aid to parochial schools and other benefits to religious groups. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 665 (1971) (White, J., dissenting); *Welsh* v. *United States*, 398 U.S. 333, 367 (1970) (White, J., dissenting); *Abington School District* v. *Schempp*, 374 U.S. 203, 308 (1963) (Stewart, J., dissenting).[6] The argument has appeared in dissenting opinions, and Supreme Court majorities have consistently rejected it. In *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), for example, where use of the public schools for religious services during school hours was declared unconstitutional, respondents had urged that the First Amendment was "intended to forbid only government preference of one religion over

5. The current test is that Government establish a "compelling state interest" to overcome a showing of "undue burden" on the free exercise of a particular religion. *Sherbert, supra; Wisconsin* v. *Yoder, supra.*

6. *See* Schwarz, "No Imposition of Religion: The Establishment Clause Value," 77 Yale L.J. 692 (1968).

another, not an impartial governmental assistance of all religions." 333 U.S. at 211. Their argument was rejected because government aid to all religions "is not separation of Church and State." 333 U.S. at 212. *McCollum's* reasoning has been reaffirmed repeatedly, *Torcaso* v. *Watkins*, 367 U.S. 488, 494 (1961); *Zorach* v. *Clauson*, 343 U.S. 306, 315 (1952).[7] The Free Exercise Clause provides a shield against government interference with religion, but it does not offer a sword to cut through the strictures of the Establishment Clause. The "secular purposes" advanced by the majority are nothing more than reiterations of justifications rejected in *McCollum*, *Lemon*, and *Torcaso*. There is no valid secular legislative purpose behind the rule. Its purpose is to protect and advance particular religions.

This purpose is clearly evident in the remarks of Senator Randolph, who authored the 1972 amendment. Although the majority cites his

7. *Zorach* held that a public school system does not violate the Establishment Clause by allowing pupils "released time" for religious instruction outside school building and grounds during what would otherwise be "school time." *Zorach* explicitly reaffirmed *McCollum*, 343 U.S. at 315, stating, "The government must be neutral when it comes to competition between sects." *Zorach's* holding that government "can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction," 343 U.S. at 314, does not control this case. Here Government has *required* employers to accommodate to their employee's religious practices.

argument that the amendment would advance freedom from religious discrimination (despite its requiring discrimination on religious grounds), the majority fails to quote the real reason why Senator Randolph introduced the amendment:

> I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.
>
> My own pastor in this area, Rev. Delmer Van Horne, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers.[8]

The purpose evident in these remarks is the promotion of certain religions whose followers'

8. 118 Cong. Rec. 705 (1972). Although arguments made on behalf of legislation do not condemn it if a valid purpose exists, legislative history is one guide to discerning the purpose of legislation. *McGowan* v. *Maryland*, 366 U.S. 420, 453 (1961).

practices conflict with employers' schedules. The promotion of a particular religion is not a justifiable ground for legislation. Otherwise, the neutrality principle, which is the core of the First Amendment, would be violated.

Not only does the religious accommodation rule lack a secular purpose. It also fails the second test under *Nyquist*. It lacks "a primary effect that neither advances nor inhibits religion," 413 U.S. at 773. It is, in other words, neither "evenhanded in operation" nor "neutral in primary impact," *Gillette*, 401 U.S. at 450. *Accord Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947). The religious accommodation rule violates these principles in two respects.

First, the religious accommodation requirement discriminates between religion and non-religion. Only those with "religious practices" may benefit from the rule. Others are forced to submit to uniform work rules and to bear the burdens imposed by their employers' accommodation to religious practitioners. Thus, the rule discriminates against those with no religion, although the freedom not to believe is within the First Amendment's protection. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Board of Education* v. *Barnette*, 319 U.S. 624, 641 (1943).

Second, it discriminates among religions. Only those which require their followers to manifest their

belief in acts requiring modification of an employer's work rules benefit, while other employees are inconvenienced by the employer's accommodation. By singling out particular sects for government protection, the Federal Government has forfeited the pretense that the rule is merely part of the general ban on religious discrimination. "The government must be neutral when it comes to competition between sects." *Zorach* v. *Clauson*, 343 U.S. 306, 315 (1952).[9] It has not been neutral here.

In two respects, then, the religious accommodation rule is neither "neutral in primary impact" nor "evenhanded in operation." Unlike the exemption from the draft laws for those conscientiously opposed to all war upheld in *Gillette*, the preference here is extended on the explicit basis of "religious practices" under the Regulation and "all aspects of religious observance and practice, as well as belief" under the 1972 amendment. The primary, indeed the sole, impact of the rule is to aid particular persons on the basis of their religion. Thus, it is incorrect to say, as does the majority, that the primary effect of the rule "is to inhibit discrimination, not to advance religion." The rule mandates discrimination on the explicit basis of religion. its primary effect is to aid particular religious sects.

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9. *See also Everson* v. *Education*, 330 U.S. 1, 15 (1947).

Accordingly, the religious accommodation requirement violates the First Amendment. As we stated recently in *Daniel* v. *Waters*, ____F.2d____, No. 74-2230 (6th Cir. April 10, 1975), *citing Epperson* v. *Arkansas*, 393 U.S. 97, 103-40:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.
>
> As early as 1872, this Court said: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson* v. *Jones*, 13 Wall. 679, 728. This has been the interpretation of the great First Amendment which this Court has applied in the many and subtle problems which the ferment of our national life has presented for decision within the Amendment's broad command.

Because the religious accommodation rule violates the First Amendment under the first two tests of *Nyquist*, it is unnecessary to consider whether it also fosters "excessive entanglement" of Church and State. *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971); *Walz* v. *Tax Commission*, 397 U.S.

664, 674 (1970). It is fair to note, however, that the 1972 amendment is worded far more broadly than Regulation 1605.1. The 1972 amendment extends to "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). It therefore protects employees who object on religious grounds to making particular products (*e.g.*, a religious pacifist's refusal to make ammunition), to shaving (*e.g.*, *Eastern Greyhound Lines Division* v. *New York State Division of Human Rights*, 27 N.Y. 2d 279, 265 N.E. 2d 745 (1970)), to joining a union in a closed shop (*e.g.*, *Gray* v. *Gulf, Mobile & Ohio R.R.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971)), and to doing a host of other things often required of employees by employers.[10] Disposition of complaints under the amendment will require inquiry into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of claims, procedures which are not favored and may themselves be improper because they put courts in review of religious matters.[11]

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10. *See generally* Comment, "Religious Observance and Discrimination in Employment," 22 Syr. L. Rev. 1019 (1971).

11. *See United States* v. *Ballard*, 322 U.S. 78 (1944); *Founding Church of Scientology* v. *United States*, 409 F.2d 1146 (D.C. 1969); *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-16 (1972).

Striking down the religious accommodation rule would not change the law requiring employers to disregard religion in employment decisions. Discrimination based on religion is illegal. If a Saturday Sabbath observer can show that an employer discharged him for refusing to work on Saturdays although similarly situated employees were not required to work on Saturdays or were exempted from Sunday work, he could maintain that the actual reason for his discharge was religious discrimination, not his refusal to work on Saturdays. *Cf. McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973); *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974). Similarly situated employees must be treated equally. Striking down the accommodation requirement would merely ensure that no employee be treated preferentially because of his religion.

It may be asked whether striking down the religious accommodation rule would deprive our nation of a rich diversity of religious practices by allowing prevailing employment policies to force persons into predominant patterns of religious observance.

Our heritage has not withered because of the constitutional requirement that Government keep "hands off" religion. The heavy hands of Government may not be raised against or in favor of religion. As Judge Learned Hand wrote,

> The First Amendment protects one against action by the government, though even then, not in all circumstances [footnote omitted]; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *iniquitous dens*, no matter what economic loss his change of domicil entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.[12]

This is not to say that a wise employer could not decide that as a matter of sound business practice and good employee relations to accommodate to his employees' religious practices. Forbidding the government from *requiring* accommodation would not be holding that accommodation may not be made by private or public employers. There must be room to maneuver between the Free Exercise and the Establishment Clauses. This space is properly

12. *Otten* v. *Baltimore & O. R.R.*, 205 F.2d 58, 61 (2d Cir. 1953).

filled by the employer's discretion. *Cf. Stein* v. *Oshinsky*, 348 F.2d 999 (2d Cir. 1965). Striking down the accommodation requirement would merely serve to permit this range of discretion.

Like the majority, I believe that religious discrimination in employment must end. Title VII says that it must and promises that it will. In pursuit of this objective, I cannot condone a rule that mandates discrimination on the basis of religion. This rule breaches the neutrality principle which is at the heart of the First Amendment. Mindful of my obligation to preserve the Bill of Rights, I respectfully dissent.

APPENDIX E

APPENDIX E

Filed May 23, 1975

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 74-1607

PAUL CUMMINS, Plaintiff-Appellant,

v.

PARKER SEAL COMPANY, Defendant-Appellee.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and McCREE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court in this cause be and the same is hereby reversed and the cause is remanded for further proceedings.

It is further ordered that Plaintiff-Appellant recover from Defendant-Appellee, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman

Clerk

A True Copy.

Attest:

Issued as Mandate:

COSTS:

Filing fee	$
Printing	$
Total	$

John P. Hehman , Clerk

APPENDIX F

APPENDIX F

Filed July 18, 1975
John P. Hehman, Clerk

No. 74-1607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL CUMMINS, Plaintiff-Appellant,

v.

ORDER DENYING
PETITION FOR REHEARING

PARKER SEAL COMPANY, Defendant-Appellee.

Before PHILLIPS, Chief Judge, and CELEBREZZE and McCREE, Circuit Judges.

No judge of the court having moved for rehearing in banc and the petition for rehearing having been considered, it is ORDERED that the petition for rehearing be and hereby is denied. Judge Celebrezze would grant the petition for rehearing for the reasons stated in his dissenting opinion.

Entered by order of the court.

John P. Hehman, Clerk

By /s/ Grace Keller
Grace Keller
Chief Deputy

APPENDIX G

APPENDIX G

Nos. 74-1761 and 74-1762

U.S. COURT OF APPEALS
SIXTH CIRCUIT (CINCINNATI)

MCCANN L. REID .... PLAINTIFF-APPELLANT

VS.

MEMPHIS PUBLISHING
CO. ..... DEFENDANT-APPELLEE

Decided August 20, 1975

WEICK, Circuit Judge:—Appellant Reid has appealed from an order of the District Court denying his motion to assess attorney's fees against appellee, Memphis Publishing Company. The Publishing Company has cross-appealed from a judgment entered against it in favor of Reid in the amount of $7,349, for damages for allegedly failing to employ him as a copyreader in one of its newspapers, because of his religion.

This is Reid's second appeal. Our opinion in the first appeal is reported at 468 F.2d 346, 5 FEP Cases 69 (6th Cir. 1972).

In his complaint Reid alleged that the defendant failed to employ him as a copyreader in one of its

newspapers. Memphis Press Scimitar, because of his race (Negro) and his religion (Seventh Day Adventist) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. He prayed for a mandatory injunction ordering the defendant to employ him as a copyreader, awarding him back pay from the date of his application for employment (September 1967), and attorney's fees.

The District Court heard the evidence and on August 13, 1971 it adopted findings of fact and conclusions of law. The Court found that the defendant did not discriminate against the plaintiff in failing to employ him, either on account of his race or his religion.[1]

Relying on our decision in Dewey v. Reynolds Metals Co., 429 F.2d 324, 2 FEP Cases 687, 869 (6th Cir. 1970), affirmed by an equally divided court 402 U.S. 689, 3 FEP Cases 508 (1971), the District Court held that the Press Scimitar was not required to accommodate Reid's religious practice of not working on Saturdays inasmuch as the position of copyreader, for which Reid had applied, required work on Saturdays. The Press Scimitar had never employed a copy reader who would not work on Saturdays. The District Court dismissed Reid's complaint.

1. The findings of fact and conclusions of law are set forth in our opinion in the first appeal and need not be repeated here.

On appeal (Reid's first appeal) the panel approved the findings of fact of the District Court and also its conclusions of law with respect to the racial issue, and that issue is no longer in the case.

The panel distinguished Dewey on the ground that it involved a major issue of arbitrability which is not present in the case at bar.[2]

Dewey was further distinguished on the ground that Regulation § 1605.1 of E.E.O.C. (39 C.F.R. 1605, adopted July 10, 1967) requiring accommodation, had not been adopted and was not in force at the time the controversy in Dewey arose, although the District Court in that case had erroneously applied it retroactively. This regulation was in full force and effect at the time Reid applied to defendant for employment.

The employer in Dewey also permitted its employees to arrange for substitutes when they were required to work on Saturdays or Sundays, and we held that was an accommodation.

The panel remanded the case to the District Court to determine—

". . . whether the Press Scimitar could make "reasonable accommodation" to the religious

2. The question of arbitrability was finally set to rest by the Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36, 7 FEP Cases 81 (1974). This question may have been the sole reason for the division of the Supreme Court in Dewey.

practices of Reid without undue hardship". (468 F.2d 346, 5 FEP Cases 69)

It is interesting to note that in the "Conclusion" of his brief filed in the first appeal in this Court on March 8, 1972, Reid—

. . . respectfully prays this Court to reverse the decision of the district court and order the defendant appellee immediately to offer acceptable employment to the plaintiff.

Notwithstanding this prayer, it appears from the record in the present appeal that Reid nearly two years previously had accepted employment from another employer on July 1, 1970, at a salary higher than that offered by defendant. No mention was made of this fact in the findings of fact and conclusions of law adopted by the District Court at the first trial on August 13, 1971, nor in our opinion in the first appeal. 468 F.2d 346, 5 FEP Cases 69 (6th Cir. 1972). We would think that if this fact was in evidence the District Judge would have included it in his findings.

In his brief filed in the present appeal (second appeal) Reid offers the following explanation of his conduct, in footnote 1 on page 11:

"Today plaintiff, because of the lengthy delays of litigation, has other employment. He sought this employment to survive and to mitigate damages. Like teachers discharged without due process, he is

entitled to back-pay. If he were still interested in this job, the defendant could, for the time, attempt an accommodation. The court below has denied attorneys fees because no injunction is now necessary. The net effect of that ruling is to penalize plaintiff and his counsel for attempting to mitigate damages."

No supporting record references are cited. This explanation simply does not make sense. Reid had already accepted other satisfactory employment at a higher salary, more than a year prior to the time the District Court adopted its findings of fact and conclusions of law at the first trial.

At the time Reid made application to defendant for the position of copyreader, Reid had employment as Editor of Tri-State Defender, at a salary of $100 per week. His beginning salary in defendant's employ would have been $125 per week plus stated annual increases if his work was satisfactory.

The claim that he accepted the new employment to mitigate damages is not understandable. He was not required to quit his employment at Tri-State Defender in order to secure a higher salary, for the benefit of the defendant, and he did not do so.

Furthermore, on the remand it does not appear that Reid offered to give the defendant the benefit of his higher salary to reduce his claim for damages, and the District Court in assessing damages allowed

only the difference between the salary offered by defendant ($125 per week) and his salary at Tri-State Defender ($100 per week) in computing damages at $7,349, for the period from October, 1967 through June, 1970. Thus Reid's new position was not accepted by him in order to "survive and mitigate damages" as his brief alleges.

On the remand it was clear that the issue of mandatory injunction had long become moot, and the District Judge considered only the question of damages.

The District Court stated:

> Since this suit was filed plaintiff has gained other satisfactory employment and does not at this time seek to become employed by the defendant. The relief now sought is monetary damages only. The amount of damages sought is the difference between what plaintiff would have earned while working as a copyreader for the defendant and the pay he received until he took a position paying more than he would have earned as a copy reader for the defendant, and attorney's fees.

(369 F.Supp. at 686, 7 FEP Cases at 15)

The District Court was fully conversant with all of these facts when it denied attorney's fees to Reid. In our opinion it did not abuse its discretion in so doing, and its judgment, from which Reed appealed, is affirmed.

I. The defendant owned and operated two large newspapers in Memphis, Tennessee, named The Commercial Appeal, which is a morning newspaper, and The Memphis Press-Scimitar, which is an afternoon newspaper, the Press-Scimitar publishing three editions daily (excluding Sundays) and two on Saturdays. The Commercial Appeal publishes every day, including Sunday.

Each newspaper maintains its own editorial department and they operate competitively, although they do not raid each other's personnel. The editorial departments include editors, copyreaders and reporters.

In September, 1967 Reid applied to the News Editor of the Press Scimitar for the position of copyreader. The Press Scimitar had ten copyreaders. One of its copyreaders, George Lapides, desired to be transferred to the Sports Department, and if the transfer were made there would be a vacancy. Lapides worked on Saturdays. Reid had been in the employ of the Tri-State Defender, a small weekly newspaper, located in Memphis.

The Press Scimitar's News Editor arranged for Reid to take a test, which he passed, and he was then sent to the Managing Editor, and by him to the Editor, for a final interview. Both News and Managing editors recommended his employment. At the final interview with the Editor, Reid's

compensation of $125 per week was agreed upon, which was $25 per week more than he was receiving at Tri-State Defender.

During the course of his conversation with the Editor, Reid mentioned for the first time that he was a member of the Seventh Day Adventist, and that he could not accept employment requiring him to work on Saturdays. This fact had not been disclosed either to the News Editor or to the Managing Editor.

To employ Reid as a copyreader would have created serious and difficult problems for the newspaper, because Reid would never work on any Saturday and would be off work more than fifty Saturdays in a year. The Press Scimitar publishes two editions on Saturday; and even in an emergency when momentous news breaks, which has to be processed immediately because otherwise it becomes stale, the newspaper could never call upon Reid for any help on Saturdays.

The only position which the Press Scimitar had open was one which required work on Saturdays, and the man whom Reid was to replace if he was hired, worked on Saturdays.

The Commercial Appeal, on the other hand, publishes on Saturdays and Sundays. If it had an opening for a copyreader it could have accommodated Reid by having him exchange with a

copyreader who wanted to work on Saturdays instead of Sundays. Commercial Appeal had employed Negroes as well as Seventh Day Adventists. Reid did not apply to the Commercial Appeal for any position, and there was no proof offered that it had an opening for a copyreader.

Copyreaders are specialists and are not readily interchangeable. The minimum number of copyreaders employed by the Press Scimitar from Monday through Friday, is seven; on Saturday the minimum is five.

Copyreaders serve as a "reduction group" to sift through, sort out, reduce, and locate in appropriate places in the newspaper all of the news which comes in by wire, from reporters and from other sources. The newspaper would not have space to publish all of the news which it receives, and not all news which it receives is newsworthy. It takes real specialists to handle this work.

The Press Scimitar's copyreaders include a news editor, called a "slot man," a telegraph man, and a man to handle mid-south news; all of these positions require special skills and experience. The remaining copyreaders handle routine work of lesser importance such as special features, make up, and markets.

The heaviest publication days are the first five days of the week, and the best qualified copyreaders are usually assigned to work on those days, leaving

Saturdays as their day off. These are all men who would have seniority over Reid, if hired. It is necessary, occasionally, for copyreaders to work overtime during the first five days of the week.

The problems of work-scheduling copyreaders is set forth in the findings of fact adopted by the District Court, on the remand, and the Court's findings are appended hereto as Appendix "A."

Even under ordinary circumstances, without anyone claiming special privileges, the work-scheduling of copyreaders presents a difficult task. This task is performed by the News Editor, with the approval of the Editor. In making the assignments he must take into account their special skills and adaptability for the work. The normal workday for copyreaders is eight hours; it ranges, however, from five o'clock a.m. until 4:30 p.m., except on Saturday when it extends only to 1:30 p.m. The News Editor must take into account absences of the copyreader on account of accident, illness, and vacation. Vacations run for two, three, or four weeks, depending on length of service. Seniority must be taken into account also. Reid, as a new employee, would have no seniority.

In order for Reid to be accommodated, another copyreader who had seniority over Reid, would have to be involuntarily assigned to take his place on every Saturday, even though the other man did not desire to work on that day.

In Dewey, supra, there was no problem in providing substitutes for employees who did not want to work on Saturdays or Sundays, because that case involved a manufacturing plant with many employees who were doing the same type of work as Dewey. Some were pleased to have Dewey work in their place on Sundays, and they would substitute for him on Saturdays when requested; but Dewey finally took the position that it was a sin for him to ask anyone to substitute for him. The employer in Dewey required the employees to make their own arrangements, in order to avoid discrimination, and when Dewey declined and refused to work on Saturdays he was discharged.

Our case presents a problem entirely different than Dewey, because it involves only a limited number of specialists.

Copyreaders having seniority usually do not want to work on Saturday. They have already worked forty hours during the first five days of the week, and some may even have worked overtime. If they are required to work on Saturdays, they would be entitled to overtime compensation. The Editor was of the opinion that even overtime was not a reasonable alternative. He was of the view that in order to accommodate Reid it would have been necessary for his newspaper to employ still another copyreader in addition to Reid.

In his findings of fact the District Judge found that the proof of expense which the newspaper would

incur in order to accommodate Reid, was not specific. We disagree. The proof was specific that overtime would cost $77 per day. The extra copyreader would cost about $125 per week, which was the salary offered to Reid by Press Scimitar.

The Editor was of the opinion that to hire Reid, with all Saturdays off, would create a serious morale problem among the other nine copyreaders who would have seniority over Reid, but who, nevertheless, would be involuntarily assigned to take his place for Saturday work. The copyreader could believe that Reid was being given favorable treatment over them, because of his religion, and that they were being discriminated against and were being penalized because they did not hold the same religious beliefs as Reid.

Furthermore, because Reid would never work on Saturdays, he could not be considered for promotion to better positions such as News Editor, Managing Editor, and Editor, all of whom work on Saturdays when necessary.

The District Court also made the following ultimate finding with respect to hardship:

> While it is true that the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be considered a hardship for management personnel, the test is *undue* hardship, which the Court does not believe to be established by the proof.

(369 F.Supp. at 690, 7 FEP Cases at 18).

Thus, the District Court was of the view that it is all right to impose a hardship on an employer, so long as it is not an *undue* hardship.

It is noteworthy that the District Court made no finding that the Press Scimitar discriminated against Reid on account of his religion. All that it found was that it would not have been an undue hardship for the Press Scimitar to accommodate Reid's religious practice.

Webster's New International Dictionary defines hardship as follows:

> "1. Hard circumstances of life; 2. a thing hard to bear; specific cause of discomfort or suffering as poverty, pain, etc. Syn. difficulty."

Undue is defined:

> "1. Not yet owing or payable as a debt; 2. improper; not appropriate or suitable; 3. not just, legal or equitable; 4. excessive, unreasonable, immoderate."

The District Court was of the view that Press Scimitar should have employed Reid on a trial basis in order to see how it would work out; but the District Court had already found that this would create a hardship. It would have imposed an additional hardship and expense on the newspaper "to try him out," when it knew it would not work.

Apparently no hardship was imposed on Reid, because in July, 1970, long before the first trial, he accepted other employment at a higher salary, and which employment apparently did not require him to work on Saturday. He is no longer interested in working for Press Scimitar. All he wants now are damages, plus attorney's fees.

The undue hardship imposed on the Press Scimitar in the present case, as shown by the evidence and the findings of fact of the District Court include:

(1) Requiring it to employ Reid as a copyreader in a position which regularly required working on Saturdays, and to replace an employee who worked on Saturday, when Reid declined to work on these days because of his religious beliefs and practice as a Seventh Day Adventist.

(2) To employ Reid would require the employer to assign, involuntarily, other copyreaders who would have seniority over Reid, to take his place, thereby incurring overtime expense amounting to $77 per day. The Editor testified that even overtime was not a reasonable alternative, and that it would probably be necessary to employ an additional copyreader. Thus, to employ Reid would require the employer to employ two copyreaders, when it needed only one.

(3) The involuntarily assignment of other copyreaders to work on Saturday to substitute for Reid, when they had seniority over Reid, who had no

seniority, would create serious morale problems among the other copyreaders.

In our opinion the ultimate finding of the District Court that the accommodation of Reid's religious practice of not working on Saturdays would not have imposed an undue hardship on his employer, is not supported by substantial evidence and is clearly erroneous.

II. Title VII of the Civil Rights Act of 1964 contains two sections which are relevant to the controversy here.

42 U.S.C. § 2000e-2(a) provides:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise *discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origion; . . .
>
> (Emphasis added).

42 U.S.C. § 2000e-5(g) provides in relevant part:

> . . . No order of the Court shall require . . . the hiring reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for

any reason other than *discrimination* on account of race, color, religion, sex, or national origin . . .

(Emphasis added).

These two statutes are plain and unambiguous. They are aimed solely at discrimination and nothing else.

The legislative history of the 1964 Act indicates that Congress was concerned that management prerogatives should be left undisturbed to the greatest extent possible, and that internal affairs of employers must not be interfered with except to the limited extent that correction is required in *discriminatory* practices. 1964 U.S. Cong. & Adm. News, at 2516.

EEOC recognized the congressional mandate in its initial 1966 Guidelines. These Guidelines provided:

Section 1605.1(a):

"(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday."

Section 1605.1(b):

"(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

These two guidelines carried into effect the will of Congress as expressed in 42 U.S.C. §§ 2000e(a) and 2000e-5(g). They expressly recognized that the employer was free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, even though it may not operate with uniformity in its effect upon the religious observances of his employees. The job applicant, knowing or having reason to believe that such requirements would conflict with his religious obligations, was not entitled to demand any alterations in the requirements to accommodate his religious needs. Under this regulation Reid would not have been entitled to demand any accommodation from Press Scimitar to accommodate his religious practices.

It was not until 1967 that EEOC abandoned the 1966 Guidelines and adopted a new Guideline, which provides as follows:

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

§ 1605.1 Observation of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employes who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

(Sec. 713(b), 78 Stat. 265; 42 U.S.C. 2000-12 [§ 2000e-12(b)] [32 F.R. 10298, July 13, 1967]

This guideline for the first time decreed that the duty not to discriminate on religious grounds included an additional obligation on the part of the employer to accommodate all of the religious practices of his employees or prospective employees so long as they did not impose an undue hardship on him.

We submit that a fair reading of the two statutes hereinbefore quoted discloses no such legislative intent, nor is the guideline supported by the legislative history which we have detailed in Dewey. The clear language of the statutes does not indicate that Congress ever intended to coerce employers into accommodating all of the religious practices of their employees or prospective employees.

Title VII, in proscribing discriminatory practices in employment, served a legitimate and laudable legislative purpose; the 1967 EEOC Guideline 1605.1 does not. By this Guideline EEOC has injected something new and entirely different from discrimination. It has required employees not only to tolerate the religious beliefs but also all of the religious practices of their employees, no matter what they are,

even though a hardship is inflicted on the employer, so long as it is not an undue hardship. The legislative history of the Act does not show anything that employers have done to warrant such treatment.

In Dewey, supra, the District Court applied the 1967 Guideline notwithstanding the fact that it was not in force at the time the claim in that case accrued. The 1966 regulation was actually in force when the controversy in Dewey arose. We expressed doubts in footnote 1, in Dewey, as to the authority of EEOC to adopt the 1967 Guideline which was erroneously applied by the District Judge. We stated:

> It should be observed that it is regulation 1605.1(b) and not the statute (§ 2000e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is *only* discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted.

(429 F.2d at 331, n.1, 2 FEP Cases at 691)

This doubt was based on the fact that the two statutes hereinbefore quoted were aimed solely at discrimination. Actually the statutes needed no Guideline or Regulation to interpret them.

While Congress has authority to grant power to an administrative agency to prescribe rules and

regulations to administer a statute in order to carry into effect the will of Congress as expressed in the statute, that authority does not include the power to make law, because no such power can be delegated by Congress. The two statutes expressed nothing about a requirement for employers to accommodate the religious practices of its employees.

In Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129 (1936), the Supreme Court held:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end *is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.* Lynch v. Tilden Produce Co., 265 U.S. 315, 320-322; Miller v. United States, 294 U.S. 435, 439-440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable.
>
> International Ry. Co. v. Davidson, 257 U.S. 506, 514. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable. (Italics added) (id. at 134-135).

See also M.E.Blatt Co. v. United States, 305 U.S. 267 (1938); Koshland v. Helvering, 298 U.S. 441

(1936); Commissioner v. General Mach. Corp., 95 F.2d 759 (6th Cir. 1938).

On March 24, 1972, nearly five years after the rights of the parties in the present case had accrued, Congress amended the Act to define religion. 42 U.S.C. § 2000e(j). This definition reads as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The subsequent enactment of § 2000e(j) in 1972 cannot be relied on to establish a Congressional intent with respect to the 1964 statute, which was not expressed in that statute.

As well stated by the Supreme Court in Helvering v. Credit Alliance Corp., 316 U.S. 107, 112 (1942):

> Section 115(h) was amended in 1938, subsequent to the consummation of the transaction here in question, to include money or property, but we cannot, as the Government suggests, read into the section, as it stood when the transaction took place, an intent derived

> from the policy disclosed by the subsequent amendment.

In Griggs v. Duke Power Co., 401 U.S. 424, 3 FEP Cases 175 (1971), Chief Justice Burger, who wrote the opinion for the Court, stated:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

(Id. at 430-431, 3 FEP Cases at 177).

Griggs involved § 703(h) of the Act relating to tests and EEOC Guideline issued on August 24, 1966 interpreting that section to permit only the use of job related tests. The Supreme Court held that this regulation was a correct interpretation of the intent of Congress.

We do not read Griggs as requiring the appellant, in order to accommodate Reid, to suffer a

hardship, to hire two copyreaders when it needs only one, to require it to incur overtime expense of $77 per day, or to require it to involuntarily assign other copyreaders who would have seniority over Reid, to substitute for him on Saturdays, thereby creating havoc and serious morale problems among its employees.

The judgment of the District Court in Appeal No. 74-1761, which denied attorneys' fees, is affirmed.

The judgment of the District Court in Appeal No. 74-1762, which awarded damages against the defendant, is reversed, and the case is remanded for dismissal of the complaint.

The proof establishes that a newspaper copy desk is a kind of reduction or selection department for news. Much more news comes to the paper through the wire services and through local sources than can be printed in the paper. The news that comes in includes world news, national news and local news. It is the duty of the News Editor to receive and review the news; edit it; determine what will be printed; check for punctuation: check for accuracy of fact; write head lines and sub-heads; make selection of news items or stories based upon various factors such as the nature of the news, the edition concerned, length of the story or item, and the like. The copy readers assist the News Editor in this task.

Copy readers sit at a horseshoe shaped desk. The News Editor, or person performing his function, sits at the middle of the desk and is called the slot man. The copy readers sit around the rim of the desk. As news comes in to the slot man he passes it to one of the copy readers for appropriate action.

Copy readers usually develop special abilities in addition to their general abilities, and normal operations require a crew of copy readers who possess expertise or experience in specific areas. Some of those specific areas or specialties at the Press-Scimitar are: the ability to perform as slot man; to handle telegraph, i.e. news arriving by wire; to handle Mid-South news; to handle society copy; to handle the magazine section, special features, makeup and markets.

The Press-Scimitar's normal complement of copy readers is ten, including the News Editor who mans the slot position when on duty.

The scheduling of the copy readers is done on a weekly basis by the News Editor subject to the approval of the Managing Editor. The scheduling is difficult for various reasons. First, the specialty requirement must be considered. While some copy readers possess more than one specialty, in addition to their general ability, none possess all of the specialties; and while some by additional training might acquire additional special skills, experience

has demonstrated that certain ones are more adapted by nature, and others less adapted by nature, to become proficient in special skills. Because of this need for special skills, all copy readers are not interchangeable with all other copyreaders.

The processing of the three editions published daily by the Press-Scimitar, Monday through Friday, requires copy readers' services during a period of time which may vary somewhat on different days but ranges from 5 o'clock A.M. to as late as 4:30 P.M. This range of time usually requires two different persons to man the slot position on days other than Saturday. The Saturday period ranges from 5:00 A.M. to about 1:30 P.M.

The length of a normal work day for a copy reader is eight hours. The copy desk work must be so scheduled as to have adequate manpower with proper specialties present during the entire copy desk operation period. Each copy reader gets an annual vacation of two, three or four weeks, depending upon his length of service. Timewise, about forty-six weeks of time go into vacations and holidays for the copy readers. Sickness takes about another eight weeks. With a normal complement of ten copy readers, including the News Editor, overtime work is required of copy readers from time to time in order to meet the manpower requirements on the copy desk.

Trial Exhibits 4 and 5 of the June 1973 hearing are copies of weekly schedules for the copy readers.

Trial Exhibit 4 is a May 1973 schedule and Trial Exhibit 5 is a collective exhibit of five weekly schedules in November and December 1967. These exhibits and testimony of the News Editor, Luther Southworth, show some of the problems of scheduling. However, they also reflect that there are regular variations from the desired normal situation and so called minimum standards. They also show that some copy readers are pulled off the copy desk for other editorial assignments, and on some occasions reporters are used as copy readers.

* * *

The proof shows that the News Editor intended to observe plaintiff's performance during a period of his adjustment to the job of copy reader at this particular paper in the light of all the duties to be performed by the available personnel. This is a process which would apply on the hiring of any new copy reader. Because the plaintiff was not hired, there is no way to determine how long it would have taken to discover what jobs the plaintiff was best suited for. However, the record clearly establishes that the plaintiff had sufficient skill and experience to successfully become one of the ten copy readers on the Press-Scimitar staff.

Proof was offered by the defendant that an alternative to manpower shortage would be to require overtime work from the available staff, at

time and one-half pay, or to employ an extra copy reader. However, the proof in this regard was not specific and the amount of the additional economic burden incident to such overtime or employment of extra personnel was not shown.

The defendant contends and offered opinion testimony from the executive personnel that if plaintiff had been employed by the defendant with all Saturdays guaranteed off, a serious morale problem would have been encountered. The proof shows two copy reader employees, Pinegar and Parker, who customarily work on Saturday, had requested to be scheduled so as to have Saturday off, but these were not for religious reasons. Their requests were refused. The proof shows that all copy readers, with the exception of the News Editor himself, are required to work from time to time on Saturday, in order to meet the manpower requirements which sometimes become critical due to factors of vacation, sickness and the fact that all copy readers are not interchangeable. However, the proof also shows that Saturday work is infrequent for some copy readers and there is a not too clearly defined rank hierachy based upon the length of service and other factors. Presumably, the lower morale would result from resentment of the copy readers with more seniority who preferred to be off on Saturday for non-religious reasons, if the management sought to accommodate the plaintiff's religious practices. There is also

opinion testimony offered by the plaintiff from a former employee of the Press-Scimitar editorial department to the effect that plaintiff would overcome this resentment.

EDWARDS, Circuit Judge, dissenting:—In Reid v. Memphis Publishing Co. (I), 468 F.2d 346, 5 FEP Cases 69 (6th Cir. 1972), this court upheld the applicability and constitutionality of an Equal Employment Opportunity Commission regulation, 29 C.F.R. § 1605.1 (1974), and remanded the case to the District Court for hearing and determinations of fact concerning "undue hardship."

No judge of the court filed any motion for reconsideration in banc.

On remand the District Judge reheard the case, made extensive findings of fact and entered judgment for the plaintiff. He held that defendant had made *no effort whatsoever to accommodate plaintiff Reid's religious beliefs.* His critical findings of fact were as follows:

> Furthermore, it should be noted that one of the distinctions made by the Court of Appeals between the Dewey case and the instant case was that the employer had offered an accommodation to Dewey prior to his being discharged. Reid v. Memphis Publishing Co., supra, at page 349. In the instant case the

defendant is unwilling to offer to anyone an accommodation in the form of being allowed to be off work on any day for religious purposes.

Having determined that a request for Saturday off for religious reasons is a reasonable accommodation, it is incumbent upon this Court to appy the facts of the case to the "undue hardship" test referred to in the E.E.O.C. regulation and the Court of Appeals remand.

The regulation specifies an example of § 1605.1(b) wherein it provides:

"Such undue hardship for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer."

This would indicate that an employer would be expected to assign other employees voluntarily or involuntarily to perform the work of the Sabbath observer, provided the accommodation meets the test or reasonableness and does not create an undue hardship otherwise.

In the instant case clearly there were other copy readers of substantially similar qualifications to perform the work to be done by the plaintiff during his observance of the Sabbath. Upon consideration of the proof pertaining to specific hardships, such as the scheduling of copy readers of particular experience, the possible effect of morale of other employees, and the possible economic burden caused by additional overtime, the Court concludes that

the defendant has not proven that an undue hardship would have rendered the required accommodation to the religious needs of the plaintiff unreasonable, particularly, in view of the fact that the defendant personnel did not make any attempt to accommodate the religious needs of the plaintiff.

While it is true that the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be considered a hardship for management personnel, the test is *undue* hardship, which this Court does not believe to be established by the proof.

The District Judge awarded plaintiff damages of $7,349—the carefully computed difference between the salary Reid would have earned with defendant and what he actually did earn in the years before he secured a better paying job. He denied plaintiff's request for attorney fees.

Astonishingly, my colleagues now reverse the District Court's carefully considered judgment simply be accepting the defendant's contentions as to the facts. As I view the matter, the majority opinion retries this case on the written record, giving no weight to the great advantage the trial judge has in seeing, hearing and judging the credibility of the witnesses.

Additionally, the majority opinion has the effect of reversing the burden of proof which the regulation places upon the employer to establish undue hardship.[1]

A full description of the case follows, including the bulk of the District Judge's opinion and findings of fact.

This case represents the second appeal in a continuing controversy between appellant Reid, a black member of the Seventh Day Adventist Church, and the company which publishes both the Memphis Press-Scimitar and the Commercial

1. For quite different reasons, both of my respected colleagues have deep-seated beliefs that the regulation at issue, 29 C.F.R. § 1605.1 (1974) (now enacted in the same words in statutory form, 42 U.S.C. § 2000e(j) (Supp. III, 1973)) is unconstitutional.

Judge Weick has expressed his concern that the regulation violates employer's constitutional rights in Dewey v. Reynolds Metals Co., 429 F.2d 324, 331 n. 1, 334-35, 2 FEP Cases 687, 691, 870-87 (6th Cir. 1970), aff'd by an equally divided court, 402 U.S. 689, 3 FEP Cases 508 (1971). Judge Celebreeze has written strongly in dissent in Cummins v. Parker Seal Co., 516 F.2d 544, 10 FEP Cases 974 (6th Cir. 1975) (A. Celebrezze, J., dissenting) (No. 74-1607, May 23, 1975, Slip Op. at 21-31), that the regulation (1605.1) is a violation of the establishment of religion clause of the First Amendment to the United States Constitution.

Neither of these constitutional arguments is frivolous and neither has been precisely dealt with by the United States Supreme Court. Each has, however, been rejected by a panel opinion of this court. See Reid v. Memphis Publishing Co., supra; Cummins v. Parker Seal Co., supra. In neither instance has there been a motion for rehearing in banc by any judge of this court.

Appeal. In the first appeal, Reid v. Memphis Publishing Co., 468 F.2d 346, 5 FEP Cases 69 (6th Cir. 1972), we held, contrary to the view of the District Judge, that an Equal Employment Opportunity Commission regulation, 29 C.F.R. § 1605.1 (1974),[2] was applicable at the time Reid was

2. § 1605.1 Observation of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

denied employment when he refused to work on Saturday due to his religious beliefs. The regulation in question requires employers to make "reasonable accommodations" to the religious needs of employees where such can be accomplished "without undue hardship."

By holding this regulation to be applicable, we distinguished this case from Dewey v. Reynolds Metals Co., 429 F.2d 324, 2 FEP Cases 687, 869 (6th Cir. 1970), aff'd by an equally divided court, 402 U.S. 689, 3 FEP Cases 508 (1971), where this court's majority opinion had held that this same regulation was not applicable at the time of the discharge there complained of and that it was not retroactive in effect.

Subsequent to defendant's refusal to hire Reid in this case, but prior to our original case, the United States Congress amended Title VII so as to add to 42 U.S.C. § 2000e (1970), the following language:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Act of Mar. 24, 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, amending 42 U.S.C. § 2000e (1970) (codified at 42 U.S.C. § 2000e(j) (Supp. III, 1973)).

We noted in our opinion:

> As shown in Riley v. Bendix Corp., 464 F.2d 1113, 4 FEP Cases 951 (5th Cir. 1972) 4 E.P.D. § 7902, legislative history of this amendment stresses that the regulation (29 C.F.R. § 1605.1) did express the prior intention of Congress. This subsequent congressional affirmation strengthens our conclusion about the validity of the regulation.
>
> Reid v. Memphis Publishing Co., 468 F.2d 346, 351, 5 FEP Cases 69, 72 (6th Cir. 1972).

On remand additional proofs were taken. Judge McRae there held on the crucial issue not only that the facts in the record did not disclose any *"undue* hardship" to the potential employer, but that defendant had made no effort whatever to accommodate Reid's religious beliefs. The District Judge reiterated a prior finding (made in the original case) that there was no intentional discrimination on the part of the defendant, but as indicated above, he awarded Reid $7,349 in damages.

Plaintiff's appeal pertains solely to the disallowance of the attorney fees, while defendant contends that under the facts of its particular

business, no accommodation to Reid's religious objection to Saturday work was possible and, hence, that its failure to make any attempt to accommodate was irrelevant.

As to this last issue, Judge McRae's critical findings were:

> Since this suit was filed plaintiff has gained other satisfactory employment and does not at this time seek to become employed by the defendant. The relief now sought is monetary damages only. The amount of damages sought is the difference between what plaintiff would have earned while working as a copy reader for the defendant and the pay he received until he took a position paying more than he would have earned as a copy reader for the defendant, and attorney's fees.

For clarity, the Court reiterates certain findings, namely, that the plaintiff was well qualified to become a copy reader for the defendant; that plaintiff was a member of the Seventh-Day Adventist Church; that one of the religious principles of the Seventh-Day Adventist Church is that its members should not work on Saturday; that plaintiff was offered the job as a copy reader on the Press-Scimitar on the condition that he make himself available to work on any day, including Saturday.

The record further establishes that the Memphis Press-Scimitar, the one of the defendant's two newspapers on which there was

an opening for a copy reader, publishes three editions Monday through Friday, two editions on Saturday and no editions on Sunday, and that the plaintiff declined to accept the position due to his sincere religious belief that he should not work on Saturday.

In accordance with the direction of the Court of Appeals Opinion, further evidence was offered on the employment practices of the Memphis Commercial Appeal, the other newspaper published by the defendant publishing company.

The proof shows that the Commercial Appeal had at the time in question two employees who were of the Seventh-Day Adventist faith and who were not required to work on Saturday. These employees were Lindley Richert and Glenn Allen. Richert was employed by the Commercial Appeal as a copy reader. The editor of the Commercial Appeal who employed Richert knew that Richert was a Seventh-Day Adventist and that he would not work on Saturday. However, since the Commercial Appeal publishes seven days per week it has need of copy readers seven days a week. Sunday was a less preferable work day for many of the copy readers; therefore, the editor employed Richert and assigned him to Sunday work on a regular basis with Saturday as one of his regular days off.

In the case of Allen, he had been an employee of the Commercial Appeal before he became a Seventh-Day Adventist. He worked in

the Commercial Appeal's library, which is staffed seven days a week. Allen customarily worked on Sunday and continued to work on Sunday after he became a Seventh-Day Adventist.

No changes in work schedules were required to be made by the Commercial Appeal, in order to accommodate Saturdays off for either Richert or Allen. On the contrary, their ready willingness to work on Sundays was well-suited to the Commercial Appeal's seven-day-per-week publishing requirement and was actually an accommodation to the newspaper.

At the supplemental evidentiary hearing the defendant offered further testimony pertaining to the duties of copy readers at the Memphis Press-Scimitar in an effort to meet the burden or proof cast upon it by the E.E.O.C. regulation determined to be applicable by the Court of Appeals, namely, that the accommodation of granting the plaintiff Saturday off would create an undue hardship on the newspaper.

The proof establishes that a newspaper copy desk is a kind of reduction or selection department for news. Much more news comes to the paper through the wire services and through local sources than can be printed in the paper. The news that comes in includes world news, national news and local news. It is the duty of the News Editor to receive and review the news; edit it; determine what will be printed; check for punctuation; check for accuracy of fact; write head lines and sub-heads; make selection of news items or stories based upon various factors

such as the nature of the news, the edition concerned, length of the story or item, and the like. The copy readers assist the News Editor in this task.

Copy readers sit at a horseshoe shaped desk. The News Editor, or person performing his function, sits at the middle of the desk and is called the slot man. The copy readers sit around the rim of the desk. As news comes in to the slot man he passes it to one of the copy readers for appropriate action.

Copy readers usually develop special abilities in addition to their general abilities, and normal operations require a crew of copy readers who possess expertise or experience in specific areas. Some of those specific areas or specialties at the Press-Scimitar are: the ability to perform as slot man; to handle telegraph, i.e. news arriving by wire; to handle Mid-South news; to handle society copy; to handle the magazine section; special features, makeup and markets.

The Press-Scimitar's normal complement of copy readers is ten, including the News Editor who mans the slot position when on duty.

The scheduling of the copy readers is done on a weekly basis by the News Editor subject to the approval of the Managing Editor. The scheduling is difficult for various reasons. First, the specialty requirement must be considered. While some copy readers posses more than one specialty, in addition to their general ability, none posses all of the specialties; and while

some by additional training might acquire additional special skills, experience has demonstrated that certain ones are more adapted by nature, and others less adapted by nature, to become proficient in special skills. Because of this need for special skills, all copy readers are not interchangeable with all other copy readers.

The processing of the three editions published daily by the Press-Scimitar, Monday through Friday, requires copy reader services during a period of time which may vary somewhat on different days but ranges from 5 o'clock A.M. to as late as 4:30 P.M. This range of time usually requires two different persons to man the slot position on days other than Saturday. The Saturday period ranges from 5:00 A.M. to about 1:30 P.M.

The length of a normal work day for a copy reader is eight hours. The copy desk work must be so scheduled as to have adequate manpower with proper specialties present during the entire copy desk operation period. Each copy reader gets an annual vacation of two, three or four weeks, depending upon his length of service. Timewise, about forty-six weeks of time go into vacations and holidays for the copy readers. Sickness takes about another eight weeks. With a normal complement of ten copy readers, including the News Editor, overtime work is required of copy readers from time to time in order to meet the manpower requirements on the copy desk.

Trial Exhibits 4 and 5 of the June 1973 hearing are copies of weekly schedules for the copy readers. Trial Exhibit 4 is a May, 1973 schedule and Trial Exhibit 5 is a collective exhibit of five weekly schedules in November and December 1967. These exhibits and testimony of the News Editor, Luther Southworth, show some of the problems of scheduling. However, they also reflect that there are regular variations from the desired normal situation and so called minimum standards. They also show that some copy readers are pulled off the copy desk for other editorial assignments, and on some occasions reporters are used as copy readers.

At the time plaintiff was being considered for the copy reader position, the Editor of the Press-Scimitar was planning to transfer George Lapides, one of the copy readers to another position, and he planned to put plaintiff, if employed into the position to be vacated by Lapides. It was customary for Lapides to work on Saturday.

The proof shows that the News Editor intended to observe plaintiff's performance during a period of his adjustment to the job of copy reader at this particular paper in the light of all the duties to be performed by the available personnel. This is a process which would apply on the hiring of any new copy

reader. Because the plaintiff was not hired, there is no way to determine how long it would have taken to discover what jobs the plaintiff was best suited for. However, the record clearly establishes that the plaintiff had sufficient skill and experience to successfully become one of the ten copy readers on the Press-Scimitar staff.

Proof was offered by the defendant that an alternative to manpower shortage would be to require overtime work from the available staff, at time and one-half pay, or to employ an extra copy reader. However, the proof in this regard was not specific and the amount of the additional economic burden incident to such overtime or employment of extra personnel was not shown.

The defendant contends and offered opinion testimony from the executive personnel that if plaintiff had been employed by the defendant with all Saturdays guaranteed off, a serious morale problem would have been encountered. The proof shows two copy reader employees, Pinegar and Parker, who customarily work on Saturday, had requested to be scheduled so as to have Satruday off, but these were not for religious reasons. Their requests were refused. The proof shows that all copy readers, with the exception of the News Editor himself, are required to work from time to time on Saturday, in order to meet the manpower requirements which sometimes become critical due to factors of vacation, sickness and the fact that all copy readers are not interchangeable. However, the proof also shows that Saturday

work is infrequent for some copy readers and there is a not too clearly defined rank hierarchy based upon the length of service and other factors. Presumably, the lower morale would result from resentment of the copy readers with more seniority who preferred to be off on Saturday for non-religious reasons, if the management sought to accommodate the plaintiff's religious practices. There is also opinion testimony offered by the plaintiff from a former employee of the Press-Scimitar editorial department to the effect that plaintiff would overcome this resentment.

The above noted proof addresses itself primarily to the "undue hardship" test which was offered alternatively in the event that the Court does not adopt a finding which supports the defendant's persistent position, namely, that granting a member of the editorial department of the Memphis Press-Scimitar a regular day off for religious purposes is contrary to the policy of the newspaper which is applied equally to all personnel.[1]

By taking this position the defendant effectively contends that the plaintiff's request to be relieved from Saturday work would be beyond the scope of a "reasonable accommodation" of his religious practices. This Court

1. While there is no proof that any person who observes the Sabbath on Sunday has indicated unwillingness to do so on religious grounds, the customs and practices of the community and the newspaper permit the employees of the Memphis Press-Scimitar to be off on Sunday except in usual circumstances.

concludes that the request of the plaintiff to be relieved of Saturday work upon the basis of religious beliefs is within the scope of the "reasonable accommodation" test imposed by Congress and those authorized to promulgate E.E.O.C. regulation 1605.

Furthermore, it should be noted that one of the distinctions made by the Court of Appeals between the Dewey case and the instant case was that the employer had offered an accommodation to Dewey prior to his being discharged. Reid v. Memphis Publishing Co., supra, at page 349. In the instant case the defendant is unwilling to offer to anyone an accommodation in the form of being allowed to be off work on any day for religious purposes.

Having determined that a request for Saturday off for religious reasons is a reasonable accommodation, it is incumbent upon this Court to apply the facts of the case to the "undue hardship" test referred to in the E.E.O.C. regulation and the Court of Appeals remand.

The regulation specifies an example in § 1605.1(b) wherein it provides:

> "Such undue hardship for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualificatons during the period of absence of the Sabbath observer."

This would indicate that an employer would be expected to assign other employees voluntarily or involuntarily to perform the work

of the Sabbath observer, provided the accommodation meets the test of reasonableness and does not create an undue hardship otherwise.

In the instant case clearly there were other copy readers of substantially similar qualifications to perform the work to be done by the plaintiff during his observance of the Sabbath. Upon consideration of the proof pertaining to specific hardships, such as the scheduling of copy readers of particular experience, the possible effect of morale of other employees, and the possible economic burden caused by additional overtime, the Court concludes that the defendant has not proven that an undue hardship would have rendered the required accommodation to the religious needs of the plaintiff unreasonable, particularly, in view of the fact that the defendant personnel did not make any attempt to accommodate the religious needs of the plaintiff.

While it is true that the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be considered a hardship for management personnel, the test is *undue* hardship, which this Court does not believe to be established by the proof.

This Court has previously found that there was no intentional discrimination on the part of defendant personnel due to plaintiff's religion. Similarly, there is no proof that the executives of the defendant were aware of the obligations imposed upon them by the regulation at the

time of the refusal to hire. However, the opinion of the Court of Appeals in this case applied Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (1971) and quoted therefrom with regard to the principle that the Civil Rights Act of 1964 proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. 468 F.2d at page 350. ". . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., supra, at page 432, 3 FEP Cases at page 178.

It must be remembered that Congress by the Civil Rights Act of 1964 recognized and established new statutory rights of employees in the areas of race, religion and sex. This imposed obligations on employers and, to some extent, employees to change some long standing policies and practices.

These findings of fact we review, of course, under the "clearly erroneous" standard. Fed. R. Civ. P. 52(a). Here the record shows that Saturday was the lightest work day of the six regularly scheduled work days. It does not show that accommodating Reid's religious beliefs would have occasioned any added expense of any kind to defendant, unless we assume that other employees would have refused Saturday assignments because Reid was exempted from them. There is no evidence which supports such an assumption because, as the District Judge

pointed out, defendant did nothing whatever to explore what it could do to accommodate Reid's religious beliefs. At a minimum, I believe the regulation here involved (now adopted by law) requires more than a simple assertion by an employer that it had always required Saturday availability and would not hire an employee who was not prepared to work on that day.

Furthermore, although the District Judge made no reference to it and placed no reliance upon it, this same employer through its other wholly-owned paper, the Memphis Commercial Appeal, operated a seven-day a week newspaper where Reid's ready availability for *Sunday* work would have been a distinct asset. Yet the record discloses no consideration at all by the employer of any possible exchange of personnel.

There may, of course, be situations where a prospective employee's unavaiablility for Saturday work would make his employment truly and undue hardship. A small newspaper which needed only on sports reporter could hardly hire a Seventh Day Adventist for that spot without "undue hardship." This case, however, presents no such facts. The District Judge's findings of fact are accurate and complete. They certainly are not "clearly erroneous." The judgment of the District Court as to damages should be affirmed.

As to plaintiff's appeal from denial of attorney fees, the case should be remanded for further

consideration. This is a Title VII action where Congress has squarely authorized attorney fees. 42 U.S.C. § 200e-5(k) (1970); Alyeska Pipeline Service Co. v. The Wilderness Society, 43 LW 4561, 4568, 10 FEP Cases 826 (U.S. May 12, 1975).